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State v. Ellington Clerk's Record v. 4 Dckt. 33843

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Volume

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IDAHO SUPREME COURT
COURT OF APPEALS

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

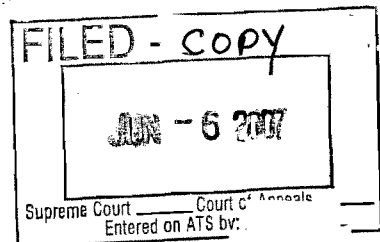
Plaintiff/Respondent,

vs.

JONATHAN WADE ELLINGTON,

Defendant/Appellant.

CASE NO. 33843



COURT REPORTER'S TRANSCRIPT
OF PROCEEDINGS ON APPEAL

ON BEHALF OF APPELLANT:

Molly J. Huskey
STATE APPELLATE PUBLIC DEFENDER
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APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI
THE HONORABLE JOHN PATRICK LUSTER, DISTRICT JUDGE, PRESIDING

2007 MAY -3 PM 4:19

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,)
)
Plaintiff,) CASE NO. CR-06-1497
)
vs.) COURT REPORTER'S
) TRANSCRIPT OF PROCEEDINGS
JONATHAN WADE ELLINGTON,)
) PRETRIAL MOTIONS
) JURY TRIAL
Defendant.) SENTENCING

AT: District Courtroom, Kootenai County
Courthouse Building, Coeur d'Alene, Idaho.

ON: PRETRIAL MOTIONS - May 5 and 31, 2006. July 21, 2006.
August 10 and 21, 2006.

JURY TRIAL - August 22, 23, 24, 25, 28, 29, 30, 31, 2006.
September 1, 5, 6, 7, 2006.

SENTENCING - December 4, 2006.

BEFORE: The Honorable John Patrick Luster
District Judge
(Sitting with a Jury)

APPEARANCES:

ON BEHALF OF THE STATE: ART VERHAREN
Deputy Prosecuting Attorney
Box 9000
Coeur d'Alene, Idaho 83816-9000

ON BEHALF OF DEFENDANT: ANNE TAYLOR, J. BRADFORD CHAPMAN
and CHRISTOPHER SCHWARTZ
Deputy Public Defenders
P.O. Box 9000
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1 MAY 5, 2006, 8:00 O'CLOCK A.M.

2 THE COURT: Good morning, this is district court, I'm
3 Judge Luster. This is the time scheduled for hearing in
4 various criminal proceedings.

5 The first matter we will take up today is State of
6 Idaho versus Jonathan Wade Ellington, 06-33. Mr. Ellington is
7 present and is represented by Miss Taylor, and the state in
8 this matter by Mr. Verharen. This case is set in front of the
9 court for purposes of, I believe, three motions that the
10 defense has filed.

11 Miss Taylor, are you ready to proceed?

12 MS. TAYLOR: Your Honor, in this case we have the motion
13 to dismiss before the court. My understanding is the court
14 has extended the time for the transcripts to be completed
15 until Monday's date, and we would move to continue the motion
16 to dismiss. We need that transcript so that we can brief the
17 issues and appropriately argue the issues and fairly and
18 accurately represent our client.

19 So with regard to that we would ask for a resetting
20 on the motion to dismiss.

21 THE COURT: I understand the motion is based upon
22 insufficient evidence adduced at the preliminary hearing?

23 MS. TAYLOR: Yes, Judge, and we will also be arguing the
24 applicability of the law as it was applied by the magistrate
25 at the prelim level, and I need his exact findings, his

1 wording of his findings before I can appropriately argue that
2 as well.

3 THE COURT: I'm not sure how I can rule on it if I don't
4 have the transcript myself.

5 Mr. Verharen.

6 MR. VERHAREN: I don't have an objection to continuing
7 the hearing.

8 THE COURT: Well, I would agree that I don't there's much
9 way to proceed. The court certainly can't resolve it without
10 reviewing the transcript. This case had been apparently taken
11 in front the magistrate for two separate preliminary hearings,
12 and they were both rather lengthy, and the transcript
13 obligation on the court transcriber, in conjunction with a
14 number of grand jury indictments that the court has been also
15 assigned, apparently created a burden for our transcriber.
16 And so while she's on schedule as far as the extensions, she
17 apparently has had some difficulty meeting some deadlines.

18 So we will go ahead and vacate the hearing this
19 morning, and we'll have to reset that, of course. I think
20 there's a trial date set in June.

21 MS. TAYLOR: There is.

22 THE COURT: We should be able to find a time. It would
23 seem to me that once the transcript is presented and reviewed
24 by counsel, and it's not going to involve a great deal of time
25 at the hearing?

1 MS. TAYLOR: No, Judge, I don't think it will.

2 THE COURT: No additional evidence that you intend to be
3 offering?

4 MS. TAYLOR: No, Judge, argument.

5 THE COURT: Does the state agree with that?

6 MR. VERHAREN: Yes, sir.

7 THE COURT: All right. I think we can probably find time
8 to get it heard well in advance of the trial.

9 MS. TAYLOR: Okay.

10 THE COURT: Other motions that you have today?

11 MS. TAYLOR: Yes, Judge, we had a motion for joinder of
12 the two cases. I spoke with Mr. Verharen yesterday and he
13 indicated that he does not have an objection to joining the
14 two cases for the purposes of trial.

15 THE COURT: And is that correct, Mr. Verharen?

16 MR. VERHAREN: It is, Judge. Miss Taylor and I discussed
17 bond in this case, and we came to a resolution on bond. Based
18 on the joinder of the two cases, I think the bond should be
19 joined as well. And it's currently set at ten million in one
20 case and a hundred thousand in the other.

21 Our stipulation is that bond just be set at one
22 million dollars for both cases. I have a proposed order in
23 that regard, if I could approach?

24 THE COURT: All right. Is that your understanding as
25 well at this time, Miss Taylor?

1 MS. TAYLOR: Yes, Judge.

2 THE COURT: Okay. I have reviewed the files, it would
3 certainly seem that the allegations in both cases stem from
4 the same set of alleged circumstances. I think it would be
5 probably a waste of resources to try these matters separately.
6 Obviously there is no prejudice on the part of the defense
7 since the defense is making the motion here. I'll go ahead
8 and order that the matters be joined for trial.

9 Also, having combined these matters, the court will
10 set bond at one million dollars for the combined cases in
11 front of the court.

12 Anything else on this motion, Miss Taylor?

13 MS. TAYLOR: Not on that motion, Your Honor.

14 THE COURT: And any anything else, Miss Taylor? You have
15 one other motion?

16 MS. TAYLOR: We do, Your Honor, we have a motion for the
17 jury to view the scene of the alleged event. That is a
18 discretionary issue with the court, and there's a lot of
19 factors the court can look at, one is whether the scene would
20 remain nearly the same as of the time of the alleged events.
21 Judge, this is a roadway, the scene is not going to change
22 much, although there was some snow on the road edges, that
23 won't be there. But the important aspects that we wish to
24 have the jury see will still be present.

25 When we went through both of the preliminary

1 hearings there were numerous photographs taken and a lot of
2 testimony about the road. Some of the specific testimony was
3 that there was a slope to the road. It was compared to the
4 grade at the 4th of July Pass. There was some testimony about
5 the amount of space one would have in that roadway.

6 Judge, the photographs do not do justice to how the
7 roadway appears when you view it in person. I went out in
8 person and looked at that, and the roadway, the space where
9 these alleged events took place is much shorter than I
10 anticipated from looking at the photographs and from listening
11 to the testimony.

12 Additionally the slope on the road, nowhere on that
13 road could you compare it to the 4th of July Pass. While
14 there's an incline coming up to the area of the alleged event,
15 it's certainly not even close to that incline. The slope of
16 the roadway itself appears to be very slight. Additionally
17 there's a lot of photographs of a driveway and there's
18 testimony expected that surrounds this driveway. Looking at
19 the photographs you would think that the driveway is quite
20 wide, and in fact it's not. It's more narrow than what the
21 photographs make it appear to be.

22 I think for the jury to accurately understand the
23 testimony that we expect to hear during trial, it's imperative
24 that they be taken out to this area and view the roadway for
25 themselves to see the length of the roadway where the alleged

1 events took place, to see the width of the roadway, and to
2 understand the rest of the testimony.

3 THE COURT: Mr. Verharen, before I hear from you I'm kind
4 of curious, the motion obviously has been timely filed and
5 presented to the court, but I don't know that it's really ripe
6 for me to decide it today. I haven't had an opportunity to
7 review the transcript of the preliminary hearing that's
8 incidental to the bindover order. Obviously as the state
9 presents their case, then issues may rise to give some
10 credence to Miss Taylor's motion on behalf of her client. If
11 I rule on it right now, I'm not sure how the court can do that
12 unless the state has no objection and then we can simply plan
13 it in our trial schedule.

14 MR. VERHAREN: I do have an objection, Judge, and perhaps
15 you can't rule on it today. I guess my objection is based on
16 security issues that we have in doing this. You have a
17 defendant here charged with murder and you're proposing
18 basically to take him out of custody up to Athol. He can't be
19 in custody at this time because the jury will figure out that
20 he's been detained and those type of issues, so you have him
21 wandering around without any handcuffs on. I don't know how
22 you could realistically do it.

23 The other option would be to not bring him along at
24 all, just bring the jury up there, and then the jury could
25 possibly draw the inference here that he didn't care enough to

1 come with the jury to view the scene, or maybe make the
2 inference that he's in custody at this time because he can't
3 come. I just see that as a whole issue fraught with potential
4 hazards.

5 And on the flip side here, you have a lot of
6 photographs of the area. There's a video of the area that I
7 intend to use at trial. I know defense counsel has probably
8 taken many photographs and they're free to make a video of the
9 area. I don't really see the need to bring a jury up there
10 because of all the photographs and because of the videotape.
11 So that's why I have an objection.

12 THE COURT: I'll reserve ruling on the issue, because
13 again I don't know that the court is fully in a position to
14 exercise its discretion until I have a little more
15 information. First of all, the examination of the preliminary
16 hearing transcript certainly would be helpful. The presentation
17 of the state's case as it develops may certainly change the
18 course of assessment one way or the other here as to the
19 necessity of the request.

20 If the state has some security issues, I'm sure that
21 perhaps some effort in advance can be made to try to address
22 those. It seems to me that anytime we have a high risk
23 individual that is charged, the jail has affixed an apparatus
24 under their clothing, that once they try to make any kind of
25 quick movement, the apparatus locks up and they're basically

1 prevented from moving. I don't know if they will use that in
2 this particular case, but I'm sure the jail has some security
3 issues that they could probably lend to deal with that if
4 that's the only question.

5 If it's imperative for a fair trial that we examine
6 the scene, then I think the security can be accomplished in
7 one fashion or another. Perhaps Miss Taylor can look into
8 some of those issues while the court ponders the question.

9 But the motion in front of the court we'll reserve
10 ruling on it until later when the court makes that
11 determination. I think that the court probably wouldn't be
12 inclined to do it until there's enough evidence in front of
13 the jury to where it becomes necessary and then becomes
14 helpful for the jury. We'll certainly withhold ruling on that
15 request.

16 Anything else at this time, Miss Taylor?

17 MS. TAYLOR: Not at this time, Judge.

18 THE COURT: And Mr. Verharen, anything else?

19 MR. VERHAREN: No, Judge.

20 THE COURT: I believe that resolves our matters in the
21 Ellington case.

22 (Proceedings concluded on May 5, 2006.)

1 MAY 31, 2006, 1:30 O'CLOCK P.M.
 2 THE COURT: Good afternoon, this is district court, I'm
 3 Judge Luster. This is the time scheduled for hearing in the
 4 matter of State of Idaho versus Jonathan Wade Ellington.
 5 These are combined cases 06-1497 and 06-033.
 6 Mr. Verharen is here on behalf of the state. And on
 7 behalf of Mr. Ellington is Miss Taylor. These matters again,
 8 I believe, are scheduled here on motions brought on behalf of
 9 Mr. Ellington. Is the defense ready to proceed?
 10 MS. TAYLOR: We are ready, Your Honor.
 11 THE COURT: Mr. Verharen, is the state ready to proceed?
 12 MR. VERHAREN: Yes, sir.
 13 THE COURT: All right. And I believe I had received some
 14 communication earlier that the state had determined that they
 15 were not going to be proceeding on certain charges that might
 16 simplify our motions today, is that correct, sir?
 17 MR. VERHAREN: Yes, sir, may I approach?
 18 THE COURT: That be would fine.
 19 MR. VERHAREN: I have a motion to dismiss case 06-33.
 20 THE COURT: Having reviewed the motion to dismiss, does
 21 Mr. Ellington have any objection to that?
 22 MS. TAYLOR: No, Judge, we don't.
 23 THE COURT: I'll go ahead then and grant the motion. I
 24 appreciate the phone call over to the office, Mr. Verharen. I
 25 had completed reviewing files in case 06-1497, and was just in

1 the process of delving rather deeply into 06-33 when I
 2 received your call, so I appreciate that information.
 3 With that, that will be dismissed. At least that
 4 will clarify the fact that Mr. Ellington is now proceeding in
 5 06-1497.
 6 Anything preliminarily before we proceed?
 7 MS. TAYLOR: No, Judge.
 8 THE COURT: Did you have any evidence that you intended
 9 to offer on any of these motions today?
 10 MS. TAYLOR: Your Honor, during the preliminary hearing
 11 we admitted into evidence the 911 tape. That was later
 12 released to us. We have a copy of that tape that Mr. Durant
 13 is in the back room just making sure is accurate and to the
 14 right spot for the court. I will want to admit that when he
 15 is finished with that part.
 16 THE COURT: I do note that the preliminary hearing
 17 transcript made reference to a number of exhibits, but I
 18 believe they have been returned to the state for the most
 19 part?
 20 MR. VERHAREN: They have, Judge, and I am going to move
 21 to admit those for today's hearing.
 22 THE COURT: The court hadn't had a real good opportunity
 23 to review all of those exhibits in light of the transcript, in
 24 preparation and review of the transcript.
 25 First of all, what additional evidence then do you

1 wish to offer, Miss Taylor?
 2 MS. TAYLOR: The tape when we're finished reviewing and
 3 authenticating that.
 4 THE COURT: Do you have an exhibit that you want to go
 5 ahead and mark?
 6 MS. TAYLOR: It's in the back room right now with
 7 Mr. Durant.
 8 THE COURT: All right. I just didn't know if we could go
 9 ahead and stipulate to some exhibits that would be submitted
 10 to the court or not here.
 11 MR. VERHAREN: Judge, I guess at this time it would
 12 probably be best for me to move to admit my exhibits. They
 13 are the same ones I used at the preliminary hearing and
 14 they're already marked as such. Do you need to look at them?
 15 MS. TAYLOR: If you can just tell me which ones you
 16 have, Art.
 17 MR. VERHAREN: It's 1 through 39. They're in the form of
 18 an audiotape, a videotape, a number of photographs and two
 19 diagrams. They're all labeled Plaintiff's 1 through 39.
 20 MS. TAYLOR: Judge, we will have no objection to the
 21 state readmitting these.
 22 THE COURT: Let me ask you this, Mr. Verharen. I think
 23 the motion in front of the court is to dismiss certain charges
 24 for lack of probable cause adduced at the preliminary
 25 hearing. And in order for the court to properly review such a

1 motion, the court needs to consider the evidence submitted to
 2 the magistrate in its entirety, which would include the
 3 exhibits that I think you have referred to. For the purposes
 4 of considering this motion, does the state wish to have these
 5 exhibits returned back to the state for purposes of trial
 6 preparation?
 7 MR. VERHAREN: Yes, please.
 8 THE COURT: So I'm not sure it's really a technical
 9 admission of the exhibits other than to simply make the record
 10 whole. So we will go ahead and consider all those exhibits as
 11 part of the preliminary hearing evidence that was presented to
 12 the magistrate.
 13 With that, do you have some evidence that was
 14 admitted at the preliminary hearing as well, Miss Taylor, that
 15 you wish to present?
 16 MS. TAYLOR: Judge, it's a copy of the tape that was
 17 admitted, and it's to the portion that we wanted the court to
 18 hear. Perhaps we should just play that with a stipulation.
 19 Mr. Durant just reviewed it.
 20 MR. VERHAREN: If I could just ask a question or two. Is
 21 the entire 911 tape the contact with the girls?
 22 MR. DURANT: Yes, the whole thing, both contact, also the
 23 other channels, too.
 24 MR. VERHAREN: Also the other what?
 25 MR. DURANT: The other channel, the communication between

1 units.
 2 MR. VERHAREN: The police channel?
 3 MR. DURANT: Yes. It was a reproduction of the whole 911
 4 tape. I cued it up to the last 12 seconds of the contact
 5 between her and 911.
 6 MR. VERHAREN: I don't have an objection to the 911 tape
 7 in terms of the contact between the 911 operator and the
 8 girls. However, I think the other portions of the tape didn't
 9 come before Judge Simpson. He only listened to the portion --
 10 MS. TAYLOR: Just side one.
 11 MR. VERHAREN: I don't have objection to that. They're
 12 telling me it's only side 1 that they want to introduce into
 13 evidence, and I don't have an objection to that.
 14 THE COURT: Side one of the tape would be that portion
 15 that was admitted and considered by Judge Simpson?
 16 MR. DURANT: Yes, Your Honor.
 17 MS. TAYLOR: Yes.
 18 THE COURT: Okay, fine, then let's have that exhibit
 19 tendered and be part of the record as well.
 20 And likewise when the court has concluded the
 21 matter, counsel wish to have the exhibit returned? I guess
 22 this is a copy?
 23 MS. TAYLOR: That's a copy, Judge, the court can keep
 24 that.
 25 THE COURT: All right.

1 at the preliminary hearing, then I suspect that any and all
 2 exhibits that were considered by the court need to be
 3 presented, so they will have to be submitted.
 4 MS. TAYLOR: We will have those brought over and submit
 5 them to the court.
 6 THE COURT: Anything additional, Miss Taylor?
 7 MS. TAYLOR: No, Judge.
 8 THE COURT: Were you planning on simply proceeding with
 9 argument today?
 10 MS. TAYLOR: We are, Your Honor.
 11 THE COURT: Go ahead.
 12 MS. TAYLOR: Your Honor, for the most part my argument is
 13 contained in the writing I submitted to the court yesterday,
 14 and I did that to speed things up a little bit. But I would
 15 like to touch on some points to emphasize to the court. We
 16 came prepared to talk about the aggravated assault charges,
 17 but with the state dismissing those, then we don't need to go
 18 through those completely again today.
 19 As far as the Aggravated Battery charge, we are
 20 arguing to the court that there was not probable cause to
 21 sustain that charge during the preliminary hearing. As you
 22 are aware, those charges were brought before Judge Marano
 23 who did not find probable cause, and then resubmitted to
 24 Judge Simpson at a later time.
 25 If you look at the preliminary hearing transcripts,

1 MS. TAYLOR: Your Honor, during the preliminary hearing
 2 we admitted three videotaped interviews with the Larsens
 3 shortly after the events on January 1st. We have not brought
 4 those back, those were released to us. Certainly we could
 5 resubmit those to the court for the court's consideration.
 6 THE COURT: Mr. Verharen.
 7 MR. VERHAREN: It's about three hours of videotape, I
 8 think. The way I understand it they were only offered for
 9 impeachment purposes to Judge Simpson. I don't know how much
 10 value that would have in terms of your finding whether or not
 11 there was probable cause for these three offenses. So I'm not
 12 so sure you would need to listen to an additional three hours
 13 of videotape in this matter. But it was part of the evidence
 14 that came before Judge Simpson.
 15 THE COURT: Miss Taylor.
 16 MS. TAYLOR: Your Honor, we think that they are
 17 important, these are statements that were made shortly
 18 following the events on January 1st, and certainly if there's
 19 a change in statement I think that's important for the court
 20 to have benefit of everything Judge Simpson had benefit of in
 21 making his decision.
 22 THE COURT: I think that's correct, unless counsel could
 23 agree that there is some evidence that has no bearing on our
 24 motion here, then perhaps we could keep it out. If we are
 25 being asked to make a determination on the evidence presented

1 both of them, you probably have kind of an idea of where our
 2 argument is going. We would submit to the court that Judge
 3 Simpson ignored a large part of the evidence, some additional
 4 evidence that was offered in his court that was not offered in
 5 Judge Marano's court. Specifically I'm referring to the
 6 testimony of Trooper Robnett and Detective Daly.
 7 Trooper Robnett testified in the first preliminary
 8 hearing, and he testified again in the second one, although
 9 there were some changes in his testimony. I'm not talking
 10 about credibility, I'm talking about further investigation
 11 on his part. His testimony in the second hearing before
 12 Judge Simpson was that at the time the Subaru and the Blazer
 13 had a collision, and I believe his belief was that the Subaru
 14 was still in forward motion, that that impact would have
 15 shifted and rotated the Blazer in another direction.
 16 Now, at the first preliminary hearing Trooper
 17 Robnett testified that the Honda was parked parallel to the
 18 centerline. But in the second hearing he indicated that it
 19 was not parallel but angled and somewhat across the
 20 centerline. The court now has the state's exhibits which show
 21 a debris field on the centerline and some spilling over the
 22 centerline into the eastbound lane of travel.
 23 Also Detective Daly testified at both hearings.
 24 Detective Daly at the second preliminary hearing had basically
 25 done a reconstruction of Trooper Robnett's reconstruction, and

1 he did his own diagram for the purposes of the second
2 preliminary hearing. He also testified about the movement of
3 the Blazer as the impact happened with the Subaru, that it
4 would rotate the direction of travel with the Blazer, and that
5 would rotate to where the Honda was. And he also testified
6 that Honda was not parallel to the centerline but was parked
7 in an angled fashion, and I believe he testified approximately
8 ten inches of the Honda hung over the centerline at that
9 point. And that rotation would have shifted the placement of
10 where the Blazer was.

11 Detective Daly also testified that the Blazer would
12 have been accelerating from the area. The acceleration and
13 the collision with the Subaru would have shifted that
14 rotation. It was Detective Daly's position as well that the
15 Honda was in forward motion.

16 Now, if you review the testimony of, I believe,
17 Jovon Larsen, she indicated that she saw her mother's car
18 move. After the hit she saw the car move, and the next thing
19 she knew the Blazer's front grille, she could see that, and
20 her airbags were going off. She said that happened in mere
21 seconds, that it was very quick from her mom's car being hit
22 to her car being hit and moving across the street.

23 I believe that Joleen Larsen testified very
24 similarly that the Subaru was hit and then the Blazer was
25 right there. This is all one very quick movement, the tape

1 that the court has, the 911 tape, indicates how quick this
2 took place.

3 I want to talk a little bit about the Second Degree
4 Murder charge, but before I do that I want the court to keep
5 in mind that we're talking about approximately a 12 second
6 time span. And that 12 seconds does not start at the
7 collision with the Subaru, it does not start at the collision
8 with the Honda, it starts before that.

9 The court has the state's exhibits, and you can see
10 a driveway depicted in one of the state's exhibits. And you
11 can see a snowbank. Now, during both preliminary hearings
12 Joleen and Jovon Larsen testified that they saw the Blazer
13 kind of slide into an impact with the snowbank at the
14 driveway. On that 911 tape you will hear one of the girls
15 say, daddy, daddy, he just hit a snowbank. That's the point
16 in time where we start timing.

17 From the time the front end hit the snowbank, the
18 Blazer has to back up and head eastbound on Scarcello Road.
19 Then there's the collision with the Subaru, which again if you
20 look at the state's exhibits, there's tracks indicating an
21 evasive movement on the Blazer's part to try to avoid the
22 Subaru. So there's the collision with the Subaru which then
23 shifts it into the Honda, the Honda and the Blazer travel
24 across the westbound land of Scarcello. And then there's a
25 movement beyond the Honda, and then you hear Joleen Larsen on

1 the telephone saying to the 911 operator that her mother has
2 been struck.

3 Now, from the snowbank, before the Blazer reverses,
4 to the point where she says her mom is struck, is
5 approximately 12 seconds long. That's a very, very short time
6 span. During that time span when you have a backing up and
7 forward motion, two collisions, and finally somebody hit, it's
8 during that time that the state is telling this court that
9 malice was formed in Mr. Ellington's mind. We're here to tell
10 you that just isn't so, that just couldn't have happened,
11 Judge.

12 In preparing for today's hearing, I looked at the
13 memo we submitted to Judge Simpson on implied malice again,
14 which I won't go into, the court, I'm sure, has reviewed. I
15 also reviewed State versus Porter case, because I thought that
16 that might be something that a court would want to know why
17 this is different. Judge, this is different because the law
18 as it was announced in the Porter case by the Supreme Court,
19 we used that in our analysis in our argument to the court, the
20 elements that have to be met to establish implied malice, and
21 that just hasn't been met in this case, Your Honor.

22 If you review the transcripts you will know that
23 Vonette Larsen was much closer to the back of the Honda than
24 was relied upon by the magistrate that bound this case over.
25 Joleen Larsen testified that her mom was close to the back of

1 the Honda. Both Trooper Robnett and Detective Daly testified
2 that they found a blood smear and tissue approximately 10 to
3 12 feet from the back of the Honda near the center of
4 Scarcello Road. They believe that that was approximately the
5 point of impact, got 10 to 12 feet from the back of the Honda,
6 and the Blazer, as was testified to, is 15 feet long.

7 Jovon also testified that the first time she saw
8 Vonette Larsen was when Vonette Larsen was already underneath
9 the vehicle, and she estimated that to be approximately
10 20 feet after there's already the forward motion.

11 You had testimony in the preliminary hearing from
12 Joleen Larsen that indicated that Vonette was moving and in
13 motion at the time that she was struck.

14 The testimony that seemed to be relied upon by the
15 magistrate in the preliminary hearing was Joel Larsen
16 indicating that he saw his wife in front of the Blazer
17 and that Mr. Ellington was looking ahead. Joel Larsen also
18 testified that he saw Vonette peripherally and just kind of
19 knew where she was and kind of knew that she was moving.
20 You'll also remember from review of that transcript that Joel
21 Larsen was to the right of this Blazer shooting at the Blazer,
22 shooting to try to stop the engine, within three feet of that
23 Blazer.

24 Judge Simpson talked about the pathway that the
25 Blazer could use to leave the area versus where Vonette was

1 standing. He indicated that there was a whole clear eastbound
 2 lane. Judge, this part where the Blazer and the Honda finally
 3 disengaged is in the westbound lane of travel, so that Blazer
 4 is already in the westbound lane of travel, and you're talking
 5 10 to 12 feet with somebody who is moving, and this happened
 6 in the flash of a second. I believe Joel Larsen testified at
 7 both preliminary hearings it was the blink of an eye before
 8 Vonette was down after the Blazer started moving forward.
 9 Your Honor, we're here today because there's no way
 10 that malice has been established in this case, either express
 11 or implied. The charging document, the Information charges
 12 that Mr. Ellington, willfully, unlawfully and deliberately and
 13 with the malice aforethought killed Vonette Larsen by striking
 14 her. That language would seem to comport with the express
 15 malice which would require an expressed intention to kill.
 16 Even if we're talking about implied malice, either way we have
 17 to know that Mr. Ellington saw Vonette Larsen, had time to
 18 react to her presence, and chose to run over Mrs. Larsen or
 19 had time to leave the other way. In 12 seconds from that
 20 snowbank until the time that Mrs. Larsen is hit is not enough
 21 time to have him be able to see her and react to her.
 22 THE COURT: Was there any evidence presented at the
 23 preliminary hearing from any expert or reconstructionist as
 24 far as this 12 seconds and what could reasonably occur within
 25 that timeframe, or is this simply the argument that you're

1 backwards to them, and then started off again as they were
 2 following him.
 3 And then on a third occasion or a third contact
 4 within this stream of events prior to the aggravated
 5 batteries, he did a U-turn in the middle of the road and then
 6 drove down their lane straight towards them. So you have
 7 these indications here that, for whatever reason, he was very
 8 angry at those girls. And I think that speaks a lot towards
 9 intent here in this case as well as motive for the aggravated
 10 battery charges as well as the murder charge. But I think you
 11 have to look at those events prior to looking at the
 12 aggravated battery events.
 13 In terms of the evidence in support of the
 14 aggravated batteries, I think Judge Simpson lays out his basis
 15 for probable cause very well, pages 600 to 608. I guess I
 16 will point out a few things that I saw in the preliminary
 17 hearing transcript that I thought were noteworthy in terms of
 18 evidence in support of the aggravated batteries.
 19 First of all on page 512 Detective Daly is
 20 testifying about what happened here in this case. And he's
 21 using the diagram, that I'll show you in a moment, that he
 22 describes there on line 18, page 512, of what the Blazer does
 23 as it comes around the Subaru. He describes it as
 24 accelerating and steering the vehicle on a direct path towards
 25 the Subaru. I think that's a typo there, I think he meant

1 adducing from the facts that were presented?
 2 MS. TAYLOR: There was not an expert to talk about
 3 reaction time, if that's what the court is asking me.
 4 THE COURT: I guess 12 seconds can be a relative thing.
 5 In one sense it can sound like not very long at all. On the
 6 other hand, 12 seconds, depending on what's occurring, can be
 7 a long period of time.
 8 MS. TAYLOR: I think that's correct, and we didn't have
 9 anybody to testify about reaction time. But I think common
 10 sense tells you that going from a forward position in a
 11 snowbank to reversing, to two collisions, and then being shot
 12 at and trying to get out of there, I think that 12 seconds is
 13 eaten up in one constant motion.
 14 And that's our argument today, Judge.
 15 THE COURT: Mr. Verharen.
 16 MR. VERHAREN: Judge, when you're looking at, first of
 17 all, the Aggravated Battery charges, I think it's important
 18 not to look at them by themselves, I think you need to look at
 19 the conduct that happened right before the two Aggravated
 20 Battery counts; that is, for whatever reason the defendant was
 21 angry at those two girls, that he got out of his vehicle,
 22 walked back to their vehicle on a public road here and hit
 23 their window and was yelling at them.
 24 Got back in his vehicle and drove off, and shortly
 25 thereafter stopped in the middle of the road and drove

1 Honda, because the next question clarifies that. But at any
 2 rate he describes how that Blazer came around the Subaru and
 3 accelerated towards the Honda.
 4 On 515, line 6, he describes what the Blazer does as
 5 it contacts the Honda, and he says it climbs onto the vehicle,
 6 it climbs higher than this elevation of the vehicle climbing
 7 onto it and leaves a tire strip there. So he describes it as
 8 coming around the Subaru, accelerating, hitting the Honda and
 9 then climbing on top of the Honda.
 10 On 518, line 9, he describes what happens as the
 11 Blazer is contacting the Honda, and he says here that it's
 12 under heavy acceleration and continues to push the vehicle
 13 backwards along this path until, as he's describing with the
 14 diagram, he says approximately to this area.
 15 Also describes here on line 17, page 518, that the
 16 Blazer is actually pushing the Honda uphill.
 17 On 526 and 527 he goes into a little bit more detail
 18 about what he means about pushing the Honda uphill and
 19 describes the grade there and the type of grade it was and how
 20 it simply, it took something more than it normally would have
 21 to push this vehicle because he was pushing it uphill.
 22 On page 540, Detective Daly, line 9, in response to
 23 a question if there was any indication that the Blazer lost
 24 control from where it and the Subaru impacting the Honda
 25 indicates that there wasn't any loss of control on the part of

1 the Blazer.

2 He also states again on page 549 in response to my
3 question: Is there anything about the impact from the Honda
4 that leads to you believe that there was a loss of control at
5 that point? He indicates that there was no loss of control,
6 and describes his reasons.

7 I think most importantly he also describes on
8 page 542 at the beginning in the middle of his answer on line
9 4 he says I have never seen a vehicle pushed 48 feet by
10 somebody who doesn't want to be there. This vehicle was
11 pushed approximately 48 feet intentionally, not by a person
12 that's out of control. And so he indicates right there that
13 he believes this contact between the Blazer and the Honda was
14 an intentional act based on some of the other testimony he
15 gave, and the fact that it was pushed for 48 feet.

16 Then you also have testimony from Joel Larson. On
17 page 308 at the top of the page Mr. Larson indicated that the
18 Blazer could have left but he came around us, when he was
19 speaking about himself and his wife and the Subaru, and
20 squared up with the girls and hit the girls.

21 On page 310, line 10, Mr. Larsen describes that the
22 defendant here just squared up with the girls and he just
23 floored it. On line 23 of the same page he describes that he
24 says with us blocking him from trying to hit the girls, he had
25 a clear path to leave.

1 Then on page 311, line 9, in the middle of a
2 response, I'll take it up here, he says we have seen it, and
3 he's describing the Blazer, hit the girls' car, the front
4 wheels come off the ground and then he landed on top of the
5 girls' hood and he just kept the motor screaming and racing.
6 And he indicated he watched the Blazer shove his girls' car
7 back approximately 30 feet. And then down on line 20 he
8 describes the sound of the engine that the Blazer was making
9 as it was doing this and he describes it as just like full
10 throttle.

11 There on the end of the page of 311, line 25, he
12 says basically here that the Blazer didn't stop until he had
13 pushed it off the road and that the passenger side tire on the
14 Honda had started digging into the dirt. There on line 4 he
15 states that the passenger side of the Honda had started
16 digging in the dirt and he couldn't push any more. So you
17 have Mr. Larsen confirming what was stated by Detective Daly
18 that he accelerated and struck the Honda and pushed it off the
19 road until he couldn't push it any more until it became
20 furrowed in the dirt.

21 Mr. Larsen on 312 describes his feelings as this was
22 happening, and in line 15 he thought the defendant was killing
23 his girls, that he thought he was crushing his girls inside
24 the car.

25 In her testimony Joleen Larsen testified about the

1 route of travel of the -- if I could approach to get an
2 exhibit, Judge?

3 THE COURT: Certainly.

4 MR. VERHAREN: The route of the travel of the Blazer to
5 the Honda. And I think, as the court will read the
6 transcripts here, it will become apparent because most of the
7 witnesses would testify from these exhibits. But what we are
8 talking about here is the contact from the Subaru around to
9 the Honda, which was parked right here, and eventually pushed
10 to here.

11 But Joleen in her testimony on page 213 described
12 the Blazer on line 16 as it crossed over the lane of travel
13 right here, the left hand lane. She is talking about this
14 lane right here, until it impacts the Honda right here, so
15 actually crossing over the lane of travel that would have left
16 the Blazer with an out. She also describes on page 214 that
17 as the Blazer was doing this on line 4 that it was
18 accelerating quite fast.

19 Joleen talked about the contact of the Blazer to the
20 Honda on 215, she indicates that she was hit in the face with
21 the airbag when the impact occurred. She describes the impact
22 as, on line 6, hard enough to make us jolt forward. And again
23 she testifies on line 19 as the Blazer is pushing her sister's
24 car, she just can hear the sound of its engine trying to
25 accelerate.

1 Joleen states on page 222, on line 5, there was
2 plenty of room for the Blazer just to leave, my sister's car
3 was in her own lane. She also testifies on page 223, on line
4 10, essentially that when her sister's car was struck and
5 pushed by the defendant in his Blazer, that she was afraid for
6 her life. You also know from the testimony of Jovon on page
7 151 that at the time the Blazer hit the Honda, the impact she
8 describes on line 16 as it hit hard and her knees hit into the
9 dash hard enough to deploy her airbags. She also goes into
10 describing her injuries that she suffered as a result of this
11 on page 158.

12 So not only do you have the evidence of his conduct
13 with the girls beforehand, Judge, you have the evidence from
14 the witnesses here that testified at the preliminary hearing
15 as to the conduct on Scarcello Road, specifically that the
16 defendant, after he backed up out of that snowbank, he and
17 that Subaru had some sort of contact there. At any rate, he
18 turned away from the Subaru and made a direct path towards the
19 Honda, contacted the Honda and pushed it 48 feet off the
20 road. At the time that he pushed it off the road, he was
21 partially on top of the Honda. That the Honda was totaled as
22 a result of this. These pictures show some severe damage.
23 And I think that Judge Simpson made the correct decision here
24 finding probable cause of the Aggravated Battery for both of
25 these women.

1 In terms of the murder charge, I think, as it is
2 important to take into contact the defendant's conduct with
3 the girls before the aggravated battery, I think you have to
4 think about that and then add the aggravated battery when
5 you're thinking about the murder. He had just gotten done
6 using his vehicle there to commit the sort of conduct that he
7 did with those two girls in the aggravated battery when he
8 turned into Vonette.

9 You know from page 531 when Detective Daly was
10 describing this portion of the incident he describes, he's
11 describing the photograph here, I think it's Plaintiff's 25,
12 but essentially the photograph of Plaintiff's 25, you will see
13 when you look at the photograph, photograph of these tire
14 marks here that lead up to Vonette Larsen. He testifies there
15 on that page that those are acceleration marks.

16 And on 542, line 9, he indicates that there was no
17 loss of control at the time that the Blazer accelerated up to
18 Mrs. Larsen. He gives his reasoning here that the brakes
19 worked, that he had control of the throttle, the steering
20 worked, all of those things were in working condition.

21 And then on 542 he indicates that the lane of travel
22 also leads him to believe that there is no loss of control.
23 On line 25, page 542, he says the operator of the Blazer
24 operated the steering mechanism and turns the Blazer into the
25 wrong lane of travel for a person who is driving a vehicle.

1 And a little bit further down on 543 he talks about, on line
2 12, the grade here. He says, on line 12, it's pretty level,
3 to cut back starting to fight, he's going level but he's
4 starting to fight the grade of the road, the super elevation
5 there.

6 What he's talking about is the two portions of his
7 testimony, the path of the Blazer to Vonette. He's talking
8 about, first of all, the fact that his path is going slightly
9 uphill against the grade. He's also talking about the path
10 going slightly to the left. It's not going away from Vonette
11 Larsen into his proper lane, which would be this way, it's
12 actually going this way into the wrong lane and swinging to
13 the left and going against the grade.

14 And then in addition to that testimony from
15 Detective Daly, you have testimony from Joel Larsen. Bottom
16 of page 316, line 20, he describes what the Blazer did after
17 it backed off the Honda. There in line 21 he takes it up and
18 says at the same time slammed it into gear and hit the
19 throttle. When I came up alongside of him, I lifted the gun
20 up. He never looked at me, he was looking straight ahead
21 through the window, straight at the wife, and he never once
22 looked, he never made eye contact.

23 Then on page 317 he describes where he could see his
24 wife there on line 23, and takes it over on to page 318 and
25 describes how he could see her out of his peripheral vision.

1 On 319 he talks about where he was when he shot at
2 the Blazer at the motor. He describes what the Blazer was
3 doing at this time. He says, first of all, that the Blazer
4 was moving in the direction of Vonette, there on line 9
5 through 11, it was going forward. That he had it floored
6 there on line 15 and he had it in low. He also describes on
7 line 21 that Vonette was about 20 feet away at the time that
8 he did that, put it into low and accelerated.

9 That's important if you take into account the
10 testimony of Detective Daly on 536. Detective Daly, on the
11 bottom of 536 got done explaining what the cone effect is.
12 And under cross-examination from Mr. Adams he's describing how
13 far away Vonette would have been from the Blazer for the
14 operator of the Blazer to see Vonette. And he gives a
15 somewhat confusing answer here, but I think you can certainly
16 get the idea here that at 20 feet away she was visible to the
17 driver of the Blazer, whether or not she was standing up or
18 squatting down.

19 On 320 Joel Larsen describes, line 11, and like I
20 said, it should have, the first angle he had a whole clear
21 path again to leave. Essentially described that he didn't have
22 to hit his wife and he could have left. On 321 he talks about
23 where Vonette was hit. He states on line 3 where in the
24 portion of the vehicle Vonette was hit, and on line 5 he
25 indicates in line 6 that the top of her face just planted on

1 the top of the hood of the Blazer. So obviously Vonette would
2 have been visible to the operator of that driver from that
3 testimony.

4 On page 322, line 2, Joel Larsen talks about what
5 Vonette was doing just before she was struck and run over by
6 the defendant. And he states here in line 2 that she was just
7 off the centerline going this way, but then she stopped and
8 then she started back the other way because he was coming,
9 looking right here, coming at her. Again indicating that he
10 could see her.

11 323, line 7, Joel Larsen testifies that the whole
12 time that he approached, hit and ran over Vonette Larsen he
13 had it totally floored. On page 389 Joel Larsen testified
14 that in regards to the steering wheel and its movement, that
15 it was like he was trying to run over my wife. He was going
16 this way, it was, it was, he was going towards the opposite
17 way and he went back. The whole vehicle, when he was running
18 over my wife, was going back and forth just like this, just
19 like he was inside. It indicates to him that it was like he
20 was trying to run over his wife there on line 23, page 389.

21 Jolcen testified on page 220, line 11, that as the
22 Blazer approached her mother and hit her mother, she could
23 just hear the sound of the engine accelerating from the
24 Blazer, and as well at the time that it was driving over her
25 mother, she could still hear the sound of the engine

1 accelerating.

2 On page 222 Joleen also testified that there was
3 enough room for the Blazer to drive around her mother. And
4 that's on line 7.

5 Again, Judge, I think you can back here and look at
6 the reasoning that Judge Simpson put on the record from pages
7 600 to 608 about why he felt that there was probable cause
8 here for Second Degree Murder. He felt there was probable
9 cause for both Second Degree Murder both on express and
10 implied malice. And I do think, Judge, that based on the
11 testimony that was given at the preliminary hearing, as well
12 as the exhibits, that Judge Simpson was right about that. And
13 I think you ought to deny this motion. Thank you.

14 THE COURT: Thank you, Mr. Verharen.

15 Anything else, Miss Taylor?

16 MS. TAYLOR: Your Honor, just a little bit. I think
17 probably the only thing the prosecutor and I are going to
18 agree on in this is that you do have to look at the entire
19 situation here.

20 Starting on Ramsey with the first contact, something
21 happened and the Blazer stopped. Mr. Ellington got out and
22 then he left. From the point that he left on Ramsey Road,
23 let's see if I can get all my roads straight, to Brunner,
24 those girls get right in behind him. They testified that he
25 stopped near a driveway where he was later seen emerging from

1 Blazer emerging from that driveway on Brunner Road. The
2 Blazer turns on Ramsey, doesn't stop, doesn't confront them,
3 doesn't do anything, travels on down Ramsey. The two
4 occupants of the white Honda get right in behind, and all of a
5 sudden there's another vehicle with two occupants in behind
6 that one. Again the chase continues at high rates of speed,
7 all the way on Ramsey to Scarcello, turning on to Scarcello at
8 high rates of speed.

9 The thing that happens with the snowbank where our
10 12 seconds start, at that time you have got a car in the
11 westbound lane and one that goes into the eastbound lane.
12 What's important about the tapes that we're going to submit
13 about the initial interviews, I think you will hear talk of
14 these four people blocking the Blazer. And I think if you
15 review this prelim transcript fairly closely you will see that
16 that was something that was said to Deputy Klinkefus, the very
17 first responder on scene, was that the Subaru pulled in to
18 block the Blazer, not from the girls, to block the Blazer in.
19 The whole part of that protecting the girls happened later in
20 a later interview with a different detective, which is a whole
21 different story.

22 THE COURT: Wasn't that Mr. Larsen's testimony at the
23 preliminary hearing, the reason that he parked the vehicle,
24 the Subaru, was to block the Blazer from approaching the Honda
25 that the girls were in?

1 the one that they told Deputy Klinkefus that he would be in,
2 and put his vehicle in reverse, and then there they were,
3 Blazer kept traveling on Brunner to Weir, and all the way on
4 Weir to Seasons Road, and then on Seasons Road and turn
5 around.

6 Meanwhile that white Honda and the two occupants are
7 right in there behind him. There are very high speeds. I
8 don't know if we'll ever know exactly how high, but there were
9 very high speeds. He people in the Honda were right in behind
10 the Blazer. The Blazer turns around on Seasons Road. Both
11 the Larsens testified that it was in a U-turn type fashion.
12 And the difference in the testimony, at the first preliminary
13 hearing Jovon Larsen testified that the Blazer stayed in her
14 lane of travel as it passed her and she had to swerve over.
15 In the second preliminary hearing which occurred in this
16 courtroom, Jovon testified that the Blazer returned to its
17 appropriate lane of travel approximately the length of this
18 courtroom, and she didn't have to swerve over.

19 But in any event, Joleen testified in both fairly
20 consistently that the Blazer went back about ten feet away,
21 went back into the appropriate lane of travel. In any event,
22 the Honda and its two occupants continue the chase back down
23 Seasons, back down Weir to the corner of Weir and Brunner
24 where the Honda occupants lost sight of this Blazer.

25 Approximately 35 minutes pass, and they see the

1 MS. TAYLOR: That was his testimony. Deputy Klinkefus
2 testified that he was told that the Subaru was pulled in to
3 block the Blazer in. But if you think about the whole
4 situation and put some logic to it, if the white Honda and its
5 occupants are in the westbound lane, and if you're one of the
6 two cars that's been chasing this vehicle, and the vehicle is
7 turning around and there's a driveway there, I don't know why,
8 if you wanted to protect that car, you wouldn't be side by
9 side with the white car, or you wouldn't angle in front of the
10 white car. I don't know why you would put in an angle to
11 block the Blazer if you're truly trying to protect.

12 But in any event, that's not what Deputy Klinkefus
13 was told, he was told they were trying to block the Blazer in
14 as the Blazer was turning around trying to leave. And that's
15 just not going to happen when the cars are blocking him in.

16 I think you have to look critically at the testimony
17 that happened in the prelim and look critically at those
18 exhibits. There was a lot of reliance on Joel Larsen's
19 testimony for Judge Simpson to bind over on these charges.
20 Joel Larsen said that the Blazer was on top of the white
21 Honda, that the tires were up on top of the white Honda.

22 If you look at Detective Daly's testimony, he
23 testified that the tire was not on the hood of the Honda.
24 Jovon and Joleen testified that it was the grille part that
25 was two feet from the windshield of the white Honda. That

1 tire of the Blazer was up against the bumper, but that tire
2 was not on top of the hood of the Honda. That was one thing
3 that Judge Simpson relied heavily on.

4 The other very important area for this court to
5 focus on is when there was testimony that that Honda was in
6 its correct lane of travel and that there was all this room
7 for the Blazer to move, and that the Blazer had to come up
8 clear around the Subaru and square up in that lane of travel,
9 the evidence just isn't there. You can look at the testimony
10 from the experts, you can look at the photographs, the debris
11 field, you can look at the diagrams, that Honda was also
12 angled partially over the eastbound lane, too, and blocking
13 the westbound lane.

14 When Joel Larsen testifies that the Blazer has to
15 pull around and square up with the Honda, that's just not, it
16 doesn't comport with the rest of the evidence that came in.

17 We understand this is an emotional situation and it
18 is probably hard for them to testify, but look at the evidence
19 on the ground, look at the evidence from the photographs.
20 There is no way that Blazer went clear around the Subaru and
21 squared up with the Honda. The Honda was already there angled
22 the same direction as the Subaru, and partially sticking over
23 into the eastbound lane of travel when that collision between
24 the Blazer and the Honda occurred. And that occurred after
25 the contact with the Subaru which rotated the Blazer back

1 around.

2 Additionally, if you look critically at Joel
3 Larsen's testimony, he said that after the Subaru was struck
4 that he turned in his passenger seat and looked behind him
5 through the back window of that Subaru, and his line of sight
6 was right down the driver's door of that Blazer. Now if that
7 Blazer had been squaring up in the westbound lane of travel
8 the wrong direction, face to face with that Honda, he would
9 have seen the passenger door, not the driver's side door. His
10 own testimony comports with the evidence, physical evidence on
11 the scene that that Honda was angled in like the Subaru was
12 angled in. That's the only way he could have seen down the
13 driver's side door of the vehicle.

14 There is testimony about all this space to leave.
15 Now, starting at after the Subaru and the Blazer engage, if
16 the Blazer rotates as was testified by the reconstructionist,
17 there is not all that room to leave, especially when the Honda
18 is protruding into that eastbound lane of travel. There is
19 not all that room to leave. After the impact with the Honda
20 and the Blazer, after there is disengagement over in that
21 westbound lane of travel, there is not all that room to
22 leave. If you look at the diagrams, it shows you on that
23 diagram where there is, I believe, the initial blood mark and
24 tissue or hair clump on the roadway. And there's the
25 testimony that Vonette was much closer to the back of that

1 Honda than 25 or 30 feet away.

2 If you want to consider the cone effect that
3 Detective Daly testified and talked to us about, that's
4 presuming a distance. And that's also presuming that somebody
5 is looking that general direction. And that's presuming that
6 even if they see that general direction, that there's time to
7 react. You have to keep in mind that there is at least one
8 gunshot within three feet of this Blazer by Joel's testimony,
9 possibly more.

10 Jovon in the first preliminary hearing recalled
11 hearing two shots after her mother was struck. Joleen
12 recalled hearing one gunshot. We know there were five rounds
13 in that gun. We're not exactly sure about when the other ones
14 were shot, but we know from Joel's testimony that one shot was
15 fired within three feet of this Blazer, that shooter standing
16 on the right-hand side of that Blazer.

17 At that Blazer, when the collision ends with the
18 Honda in that westbound lane of travel, if he's trying to
19 leave and he's being shot at and the shooter is in the
20 right-hand lane and the Honda is right there to the side,
21 there is not really anywhere for him to go but to travel down
22 that road. And again, it's within 12 seconds, Judge.

23 THE COURT: First of all, the motion in front of the
24 court is a motion brought under 19-815(a) which basically
25 challenges the sufficiency of the preliminary hearing evidence

1 that was presented to Judge Simpson. It's important to note,
2 and I know we have two different preliminary hearings here,
3 and there's certainly a comparison to some of the evidence in
4 the two different preliminary hearings. But from a legal
5 standpoint as far as considering the 19-815(a) motion the
6 court is only entrusted to look at what evidence was adduced
7 at the preliminary hearing before Judge Simpson and not
8 necessarily the evidence adduced in front of Judge Marano.

9 I recognize originally the motion in front of the
10 court was seeking to challenge the allegations that were
11 brought under 2006-33. The state has chosen today to go ahead
12 and dismiss the allegations of aggravated assault. The court
13 had done a preliminary review of those transcripts for
14 purposes of today's motion. I had some concerns, at least
15 about the initial allegation of aggravated assault, the two
16 counts involving the backing up of the Blazer purportedly
17 driven by Mr. Ellington. However, that's of no note at this
18 point in time since the state has chosen to dismiss those
19 charges and simply proceed on the one count of Murder in the
20 Second Degree and the two counts of Aggravated Battery.

21 It's important to recognize when the court reviews
22 the preliminary hearing evidence, there is certainly a
23 requirement that there was substantial evidence presented in
24 support of probable cause on each of the critical elements of
25 the charges that the magistrate ultimately bound the defendant

1 over upon. The standard is not a requirement or is not a
2 situation where this court simply second-guesses what the
3 magistrate did with the evidence.

4 I find it rather interesting how the argument has
5 proceeded here today. We have over 600 pages of preliminary
6 hearing transcript, a number of exhibits and some audiotapes
7 and videotapes that the court has yet to review, but we have
8 over 600 pages of testimony and yet both counsel have focused
9 on a very small portion of that evidence that was presented to
10 the magistrate.

11 I recognize the other charge is no longer in front
12 of the court, but I think it's interesting to note that both
13 Judge Marano and Judge Simpson, who are certainly very capable
14 magistrates and this court has a great deal of respect for,
15 listened to basically the same evidence with certain
16 variations and came up with somewhat different conclusions
17 as to what the evidence had supported. And again it's not
18 the role of this court to basically second or third guess what
19 the evidence has actually established. If this court had
20 heard the preliminary hearing, perhaps I would have come up
21 with a completely different conclusion than the other two
22 magistrates have.

23 And again the question for this court to determine
24 is whether or not there was simply substantial evidence upon
25 which Judge Simpson could have drawn his conclusions. His

1 findings, while not overly extensive, were certainly thorough
2 enough to focus on the charges that he bound Mr. Ellington
3 over on. I think it's interesting to note that the elements
4 of both Aggravated Battery and Murder in the Second Degree in
5 this particular case probably really turn on the mens rea that
6 Mr. Ellington was possessed of on the day that he was charged
7 with these particular offenses.

8 I don't think that the court can realistically
9 simply look at a 12 second window of opportunity, but to look
10 at the entire course of events that had transpired that day to
11 come up with a conclusion as to whether or not his acts more
12 likely than not were calculated with some effort to bring harm
13 to Joleen and Jovon Larsen and Vonette Larsen or were simply
14 some sort of an accident or some act of self-defense.

15 Mr. Ellington did not testify at the preliminary
16 hearings and the defense has certainly argued as to the
17 reliability of some of the evidence that's presented here to
18 the court. The magistrate was not in a position to balance
19 two specific stories, contradicting stories and then have to
20 come up with a conclusion as to what was more likely than not
21 a true allegation of the circumstances. The court is only
22 left to infer what may or may not have occurred, at least in
23 the mind of Mr. Ellington, as far as the three charges that
24 are in front of the court.

25 The magistrate is certainly free to draw reasonable

1 inferences from the evidence that was presented. Magistrate
2 is also free to assign whatever degree of credibility that the
3 magistrate chooses with respect to any of the witnesses that
4 come in front of the court. For example, the magistrate
5 certainly is free to not be particularly swayed, for example,
6 by reconstructive evidence of a law enforcement officer who
7 wasn't present but may be more swayed by one of the witnesses
8 who actually experienced the incidence. But again those are
9 all things that I think the magistrate can reasonably rely
10 upon.

11 I think the duty of this court is to simply examine
12 the evidence and make a determination as to whether or not
13 there is no reasonable way to look or view the evidence to
14 come up with a conclusion that Judge Simpson came up with. I
15 think that certainly is a difficult burden to meet on a
16 19-815(a) challenge.

17 The court will certainly examine the evidence
18 further in light of the arguments that have been presented
19 here today. I have looked over the transcripts, I took a look
20 at the brief that Mr. Ellington had filed. I haven't had an
21 opportunity to look at some of the exhibits. And again, as I
22 pointed out earlier, the magistrate is able to sit, listen to
23 the witnesses, to get some perspective as to the reliability
24 or credibility of the witnesses, watch their demeanor and how
25 they testify, detect any degree of emotion that may be

1 elicited from the testimony of the witnesses, all this goes
2 into play in terms of the magistrate reaching their
3 conclusions.

4 Furthermore, there's a lot of reference in the
5 transcripts as to this here, or that there, over here, this
6 direction, that direction, which I think all refers to certain
7 maps and exhibits that have now been presented to the court.
8 In the perspective of simply the raw transcript, there's no
9 way the court can come to any particular conclusion as to what
10 a witness was looking at. Again, certain amount of deference
11 would need to be extended to a magistrate who is able to watch
12 the witness, look at the exhibit while the testimony is being
13 presented.

14 There's been balance of the record now supplemented
15 to the court which I'll go ahead and examine in light of the
16 comments that have been made before I make a final
17 determination on this issue. I think your assistant just
18 brought over the tapes, so let's get the record complete. If
19 you want to show those to Mr. Verharen or not, I don't know.

20 MS. TAYLOR: Judge, we also have one photograph that I
21 forgot we had admitted at the preliminary hearing.

22 MR. VERHAREN: No objection.

23 THE COURT: We will go ahead and make the record complete
24 then with the balance of the exhibits.

25 And on this motion, anything else to offer to the

1 court?

2 MR. VERHAREN: No, sir.

3 MS. TAYLOR: Your Honor, not on this motion.

4 THE COURT: Any other matters to be presented by
5 Mr. Ellington?

6 MS. TAYLOR: Your Honor, the court was waiting until
7 review of the transcripts to render a decision on our motion
8 for jury view of the scene. I also recently filed was a
9 motion to continue the jury trial. I don't think the state
10 has an objection to us considering that today. I don't know
11 if he has an ultimate objection to a continuance or not, he
12 was going to let us know today.

13 MR. VERHAREN: I don't have an objection to hearing that
14 motion, Judge.

15 THE COURT: All right, we can get to that in a moment
16 here.

17 As far as the motion for the jury view, I'm inclined
18 to go ahead and grant that motion. I think that's basically
19 it. I don't know when we're going to try this case, and I
20 don't know if circumstances may change, and so the court will
21 have to certainly preface any ruling. My inclination now is
22 to certainly give the benefit of the doubt to Mr. Ellington's
23 request. To be quite honest, I have some reservations here
24 about the motion to dismiss that's been submitted in front of
25 the court.

1 MS. TAYLOR: Your Honor, we submitted that in writing.
2 We're requesting to continue this. We really don't want to
3 but we need to. We have experts that have not gotten their
4 report completed yet, and I believe the state is entitled to
5 review the report, and we certainly don't want to be prevented
6 from calling them as witnesses.

7 Additionally recently disclosed by the state was
8 what we view as some exculpatory information that we would
9 like to follow up on with regard to what should have been
10 audible on a cell phone. And we need to follow up on that and
11 perhaps obtain an expert on that. Mr. Ellington did sign a
12 waiver of his right to a speedy trial. He understands that
13 and prefers that we proceed fully prepared.

14 THE COURT: Mr. Verharen.

15 MR. VERHAREN: Judge, I guess it's kind of a wishy-washy
16 answer, because I'm not sure when you would be inclined to
17 continue it. Do you know if you were going to continue it when
18 you might be inclined to reset it?

19 THE COURT: Well, I guess, that obviously would be a
20 concern of the state. Simply continuing the matter from the
21 current setting in June might be one issue, but rolling it
22 into July might be one factor to consider. I don't know what
23 the request is here in terms of how much time. You have been
24 pretty general in terms of your need to examine the evidence.
25 I don't know if you're talking about a 30 day continuance, a

1 On the other hand, I recognize that there is a lot
2 of controversy regarding the evidence and the interpretation
3 of the evidence which bears greatly on the layout of the
4 scene, and so I think that's probably the focal point of the
5 motion to have the jury view the scene. And so my inclination
6 is to go ahead and permit that. On the other hand, we're
7 certainly assuming that the location of the incident will be
8 basically similar to the date in question. If we do continue
9 the trial and the time frame shifts, that may alter, road
10 construction, weather, a whole different variety of things
11 that could come up that would alter the practicality of
12 viewing the scene. But provided the proper foundation, I
13 guess for lack of a better term, is laid, the court would be
14 inclined to grant that motion.

15 So I guess the best thing to do, Miss Taylor, is
16 just to put you on notice to go ahead and make some
17 arrangements to prepare that proposal to the court. Again
18 assuming the things have not been altered substantially. If
19 they have, the court may have to revisit that determination.
20 But provide some kind of guidance on that request, the court
21 is inclined to allow that. Sounds like a wishy-washy ruling,
22 but I think unfortunately, like I said, things could change
23 between now and our trial date that would make that an
24 inappropriate consideration.

25 All right, your motion to continue the trial.

1 six month continuance?

2 MS. TAYLOR: No, Judge, we would ask to continue it to
3 the August trial setting.

4 MR. VERHAREN: I wouldn't have an objection to that.

5 THE COURT: Before I make that determination, let me look
6 at the court's schedule in August before we make that
7 determination. If I understand correctly from what I was told
8 earlier, this case is estimated to take approximately two
9 weeks to try, is that still your belief, Mr. Verharen?

10 MR. VERHAREN: Yes, Judge.

11 THE COURT: Miss Taylor, is that correct?

12 MS. TAYLOR: Yes.

13 THE COURT: That obviously creates some concerns on the
14 part of the court. I had made some arrangements in June,
15 knowing that this case was going to take some time, to have a
16 pro tem judge, Judge Carey, come up and handle my other
17 criminal matters so that I could be able to attend to this and
18 let the other trials be handled by the retired plan B judge.

19 So now we have a judge coming up to help out in June and I
20 don't know what the situation is later on in August.

21 I had a murder case up in Bonner County, First
22 Degree Murder case in Bonner County that was set for May, that
23 the parties moved to continue, and I had similar dilemma there
24 trying to get some assistance to handle my regular schedule
25 while I took care of a two week trial in Bonner County.

1 And so while I recognize that these types of cases
2 do result in delays from time to time, it does take a little
3 juggling of the court's schedule to see if we can
4 accommodate. Let me break for a minute and take a look at
5 that and see what we have.

6 (Recess)

7 THE COURT: I consulted not only the court's schedule but
8 I also consulted the administrative district judge, and it
9 seems like our timing is impeccable. The help we were going
10 to receive in June to back me up for the Ellington trial
11 apparently has evaporated, so that was not available. So it
12 looks like we can make arrangements to have the court's
13 calendar backed up in August. It's not a commitment on that,
14 but enough to where I'm willing to take the chance. We can go
15 ahead and schedule the matter to commence the 21st of August
16 for that two week period to follow.

17 I want to check with Mr. Ellington, though,
18 briefly. I know he has filed a written waiver, but I think
19 it's important that I should consult with him directly.

20 Good afternoon, Mr. Ellington.

21 MR. ELLINGTON: How you doing, Your Honor.

22 THE COURT: Mr. Ellington, your attorney has requested
23 that you have a little more time to prepare for your trial.
24 I'm willing to reschedule your trial in August, after having
25 consulted my calendar. However, I need to make sure that you

1 understand that if we do reschedule this matter that we can't
2 guarantee that your right to a speedy trial will be complied
3 with, do you understand that?

4 MR. ELLINGTON: I do, Your Honor.

5 THE COURT: I believe your information was filed on the
6 21st of February, And I think we probably will be meeting that
7 six month time frame. But things could go astray and we may
8 not get started right on time, and so forth. We're ready to
9 go in June, but if in fact we're going to reschedule this,
10 there is not a guarantee that we can meet that speedy trial
11 right of yours, do you understand that?

12 MR. ELLINGTON: I do, Your Honor.

13 THE COURT: You have both the right under our state
14 statute which provides that the trial should be held within
15 six months of the filing of the Information, but there's also
16 a general right under the United States Constitution and the
17 Idaho State Constitution. And again if we bump this case, we
18 may not be able to guarantee that right, do you understand
19 that, sir?

20 MR. ELLINGTON: I do, Your Honor.

21 THE COURT: Do you understand then you do have a right to
22 a speedy trial?

23 MR. ELLINGTON: I do, Your Honor.

24 THE COURT: Are you willing to waive that right at this
25 point?

1 MR. ELLINGTON: I am.

2 THE COURT: All right. We will go ahead then and
3 reschedule the matter to commence then August 21st at 9 a.m.,
4 and it will run for that two week period.

5 Counsel, I believe our pretrial conference is
6 scheduled the 11th of August at 9:30 in the morning. The week
7 before this trial I am scheduled out of town, I'm not going to
8 be available. So if there's some last minute issues that need
9 to be addressed by the court, just keep in mind that I won't
10 be able to handle those the week prior to trial, so you need
11 to have those addressed at least two weeks prior to the trial
12 date.

13 Does the state have any questions?

14 MR. VERHAREN: No, Judge.

15 THE COURT: And does Mr. Ellington have any questions?

16 MS. TAYLOR: No questions, thank you, Your Honor.

17 THE COURT: Okay, fine. With that then we'll take under
18 advisement the motion to dismiss, that will give me an
19 opportunity. I thought I was overwhelmed by the amount of
20 transcripts I had to review in preparation for this hearing,
21 and I didn't realize that that was only a small part of it. I
22 guess I have more work to do.

23 So with that in mind, if there's nothing further,
24 we'll be in recess.

25 (Proceedings concluded on May 31, 2006.)

1 JULY 21, 2006, 8:00 O'CLOCK A.M.

2 (Following the calling of other matters, court
3 proceedings were as follows:)

4 THE COURT: Let's take up the matter of State versus
5 Jonathan Ellington. 06-1497. In this matter Mr. Ellington is
6 present and is represented by Miss Taylor, and the state by
7 Mr. Verharen. This case is scheduled for trial in a couple of
8 weeks.

9 I have received an application to shorten time for a
10 motion to continue that trial that Miss Taylor has filed on
11 behalf of Mr. Ellington. As far as any objection to the
12 motion to shorten time, do you want to be heard on that,
13 Mr. Verharen?

14 MR. VERHAREN: I don't have an objection to that, Judge.

15 THE COURT: We will go ahead and proceed to hear the
16 motion to continue.

17 Are you ready to proceed on that, Miss Taylor?

18 MS. TAYLOR: I am.

19 THE COURT: Go right ahead.

20 MS. TAYLOR: Your Honor, we're asking to continue the
21 trial in this case for a couple of reasons. First, we just
22 recently had discovery regarding the 911 tape, an enhanced
23 version. That came to us yesterday.

24 THE COURT: What version?

25 MS. TAYLOR: An enhanced version of the 911 tape, and we

1 need time to follow-up on that version and do a little bit
2 more work on that.

3 The other reason, and I brought this to the court's
4 attention earlier, is that three-fourths of our defense team
5 is going to be in hearings in front of Judge Gibler at least
6 two days of this trial, the 22nd and 23rd. That is a high
7 profile case. I was not aware that those hearings were
8 scheduled until last week. They have been scheduled since, I
9 believe, February, but it didn't come to my attention until
10 last week that most of my team would be in another courtroom.

11 I am concerned about having to start the trial
12 without the team. It's beneficial to a client to have their
13 entire team present for the entire trial for a lot of reasons,
14 but it's also confusing to a jury to watch most of the team
15 walk in part way through a trial.

16 The other concern with regard to that is because of
17 the case that those motions are being heard on, there's bond
18 to be press coverage, and I think because of the nature of
19 that press coverage and then the rest of the defense team
20 coming in later, the jury will make the connection of who
21 they are. I'm concerned that that may create prejudice to
22 Mr. Ellington receiving a fair trial, it may taint the jury's
23 opinion of defense counsel and the defense team. And would
24 ask that this been moved to the September setting.

25 THE COURT: Mr. Verharen.

1 MR. VERHAREN: State is opposed to a continuance for the
2 following reasons: First of all, all my witnesses either have
3 been served or are in the process of being served, and there's
4 quite a few of them.

5 Secondly, this 911 tape that I've recently
6 discovered, that's been available to the defense all along
7 in terms of the original 911 tape. The tape that I gave to
8 the defense yesterday is simply a tape that's clearer than the
9 other tape, it's a digitally enhanced version of the 911
10 tape. So it's not new evidence, it's simply evidence that's
11 in a better form.

12 And as to the defense motion to continue on the
13 basis of this other case, you set this trial many, many months
14 ago, it seems like. I believe those Duncan motions have also
15 been set for a long time. And so I think any time from when
16 you set this trial up until now they could have gotten a
17 continuance of those Duncan motions. I don't really see a
18 need to continue our trial because Mr. Adams is going to be
19 arguing motions in another case for a couple of days.

20 So for those reasons I'd ask you to deny the motion
21 to continue.

22 THE COURT: Miss Taylor, anything additional?

23 MS. TAYLOR: Just briefly. Along with the tape, while it
24 is the 911 tape, this is in a different version, there's
25 different time gaps in it and it's broken down in a different

1 way. And additionally there's an F.B.I. report from the
2 specialist on the tape. And while we had access to the other
3 911 tape, this presents some different questions, and
4 especially if they want to use the enhanced tape, we have a
5 lot of different questions. Our experts have not received the
6 new tape yet. We just received that yesterday and we need to
7 have time for them to analyze that.

8 Judge, had I known that the Duncan motions were
9 scheduled in August, I would have anticipated the problem and
10 I would have brought it to the court's attention. I did not
11 know until last week. But I do know those motions have been
12 set since February, so their setting predated our setting for
13 this trial. And all I can do is apologize for not catching it
14 sooner than last week.

15 THE COURT: The motion to continue the trial certainly is
16 discretionary with the court, I should take into account a
17 number of factors. This matter has obviously been pending for
18 some period of time, although not an overly undue length of
19 time. Obviously the state is ready to proceed.

20 Couple of issues have been raised. First of all,
21 defense counsel is concerned that all of their defense team
22 won't be available to commence the trial due to a conflict in
23 another matter. And I think we are talking about the State
24 versus Duncan case, which certainly is a high profile case
25 within Kootenai County.

1 I'm not particularly persuaded that the absence of
2 members of that defense team who may subsequently appear in
3 court in this case is an issue that's going to give raise to
4 prejudicial impact imposed upon Mr. Ellington. If for some
5 reason the jury thinks that the same lawyers that represent
6 Mr. Duncan somehow are representing him, that that somehow
7 casts some dispersion upon Mr. Ellington, I think that's a bit
8 of a stretch that hasn't been documented by anything submitted
9 here today.

10 The court would note that this case is set to
11 commence for a two week period of time, as I understand it.
12 As I visited with counsel trying to do some logistics the
13 other day, I have a conflict on Monday of that week, which is
14 the 21st of August where I have to be in Bonner County to hear
15 motions in a First Degree Murder case in Thurlow and Lewers,
16 and that case is set to proceed in September. So continuing
17 this case until September would be an unrealistic possibility
18 for this court. It would have to be October or even later
19 into the year.

20 Furthermore, we will not be able to commence
21 actually on the 21st, but we would be commencing on the 22nd
22 and the 23rd, which would be the two days of concern here for
23 counsel. The first day, I believe, will be consumed quite
24 possibly in some simple jury selection. I shouldn't say
25 simple, but in jury selection. The second day certainly we

1 would get into arguments and some presentation of evidence.
 2 I think the appropriate way to deal with this is to
 3 deny the continuance and we will proceed to trial. I'll
 4 certainly be more than understanding in terms of how quickly
 5 we will move into the case because I think there could be some
 6 issues that need to be taken up as we proceed along the way.
 7 If we need to delay the presentation of a particular witness
 8 that one of the other members of the defense team, for
 9 example, has worked on more than Miss Taylor, for example,
 10 then I think the court can work with that and deal with the
 11 logistics of perhaps the problem rather than simply
 12 rescheduling the entire trial.

13 The State is ready to proceed. I haven't really
 14 heard that Mr. Ellington simply does not have the ability to
 15 have a fair trial advanced by his defense or that he has been
 16 deprived of any defense here by this conflict with counsel in
 17 other matters, which I can certainly appreciate. But rather
 18 than simply pack this case up and plant it in a different part
 19 of the trial calendar, I think the court would proceed to go
 20 ahead and start as scheduled now on the 22nd and try to work
 21 with counsel on the first couple of days, recognizing this
 22 limitation rather than to simply delay the case in its
 23 entire.

24 So I'm going to deny the continuance. I haven't
 25 heard enough information about this tape. I understand that

1 counsel hasn't had a chance to look it over in terms of
 2 whether or not it does reveal anything of any substantial new
 3 nature that is of concern. That might develop between now and
 4 the time trial starts, but right now I'm not persuaded that
 5 the enhanced version of the tape has really basically created
 6 any new evidence.

7 So at this point I'll leave the case set for trial
 8 to commence on the morning of the 22nd of August at 9 a.m.. I
 9 think any discussion about possibly dealing with any motions
 10 on Monday, I think we will get rid of that motion. If there's
 11 some motions in limine that need to be taken up, we can work
 12 that in with out jury selection on Tuesday. So we might be
 13 running a little bit different schedule than we originally
 14 hoped to and we'll start a little later, but I'm not going to
 15 reschedule the case in its entirety. Anything else?

16 MR. VERHAREN: No, Judge.

17 MS. TAYLOR: Just one question, Your Honor. May we
 18 submit a list of the state's witnesses that Mr. Adams had
 19 planned to cross-examine to just aid in scheduling?

20 THE COURT: That would certainly help. If the state can
 21 work around that, that would certainly be accommodating and
 22 that might avoid me having to try to decide whether that will
 23 delay the process.

24 MS. TAYLOR: We will do that, thank you, Judge.

25 (Proceedings concluded on July 21, 2006.)

1 AUGUST 10, 2006, 9:30 O'CLOCK A.M.

2 THE COURT: Good morning, this is district court, I'm
 3 Judge Luster. This is the time scheduled for pretrial
 4 conference in the matter of State of Idaho versus Jonathan
 5 Wade Ellington, that's case 06-1497. Mr. Verharen is
 6 appearing on behalf of the state. Mr. Ellington is present
 7 and I believe is represented primarily by Miss Taylor. And
 8 Mr. Chapman appears also from Miss Taylor's office.

9 Again I appreciate counsel's cooperation. We had
 10 this set for pretrial conference tomorrow morning with the
 11 bulk of my other cases. And since the Ellington case, I
 12 think, is scheduled to run for two full weeks and because, I
 13 think, there may be some other issues, I thought it would be
 14 more convenient for everybody involved to try to do a pretrial
 15 conference here separately, so I scheduled it this morning.

16 And with that is the state ready to proceed?

17 MR. VERHAREN: Yes, sir.

18 THE COURT: Miss Taylor, are you ready to proceed on
 19 behalf of Mr. Ellington?

20 MS. TAYLOR: As far as the pretrial conference or to
 21 trial?

22 THE COURT: As far as the pretrial conference?

23 MS. TAYLOR: As far as the pretrial conference, we are
 24 ready for that.

25 THE COURT: All right, fine. As far as proceeding to

1 trial, and I believe when we were last in front of the court,
 2 the court had indicated it would be commencing trial on
 3 Tuesday morning, the 22nd of August.

4 With that in mind, is the state still ready to
 5 proceed?

6 MR. VERHAREN: Yes, sir, may I approach with jury
 7 instructions?

8 THE COURT: That would be fine. And again, is
 9 Mr. Ellington ready to proceed?

10 MS. TAYLOR: No, Judge, we're not. We would renew our
 11 previous motion for a continuance.

12 THE COURT: Would this be renewed on the same grounds
 13 that were previously discussed and considered by the court,
 14 because I don't know that I have a formal motion in front of
 15 the court.

16 MS. TAYLOR: You do not have a formal motion. I spoke
 17 informally with Mr. Verharen out in the hall and I know that
 18 he opposes our motion to continue. It is sort of on the same
 19 grounds, but with a little more explanation. Because of the
 20 conflict in scheduling with the other matter that Mr. Adams is
 21 scheduled on, we have had co-counsel reassigned to this
 22 particular case. It's a disadvantage to jump on to a case
 23 with this much material, this many binders, at a late date.
 24 And I think we need more time to be fully prepared with
 25 co-counsel to go forward.

1 Additionally, upon further reviewing the evidence in
2 this case that has been proffered by the prosecutor to us as
3 discovery, and a new disclosure from RMIN, I think we talked
4 about this the last time we were before the court, we have
5 obtained the services of a new expert. We have disclosed that
6 to the prosecutor. The problem is we're not going to have a
7 report back from them. I hoped that we would get something
8 this week, and we don't have it. Mr. Durant spoke with them
9 this morning, and they don't think they can get it to us even
10 within five more days. They're going to address several
11 things.

12 Some of what we need them to address deals with the
13 newly enhanced 911 tape that the prosecutor recently gave to
14 us. That is kind of complex. We haven't been able to get a
15 call back from the man who did that tape. It isolates what
16 they're calling gunshots, and the time frames don't seem to
17 add up and we need to explore that. We need our expert to be
18 able to explore that, and we really need a call back from them
19 so that Miss Fisher can work on that.

20 But I don't feel that we're prepared. I'm concerned
21 about not having a report available to the prosecutor or
22 potential exhibits from the new expert. We don't want to be
23 prohibited from calling them, and I'm trying to prevent that
24 by asking to you continue this. I know you have something in
25 Bonner County the first part of September. We just ask that

1 maybe we can have your September Kootenai County docket.

2 THE COURT: Mr. Verharen.

3 MS. TAYLOR: And, Your Honor, I'm sorry, Mr. Verharen.

4 There is a new expert disclosed by the state, I
5 think Officer Rice from Idaho State Police, doing a review of
6 the reconstruction done by Trooper Robnett. I don't think
7 there is going to be a report on that, but certainly we would
8 like to be able to have some idea of what he's going to say
9 before we go to trial on this.

10 MR. VERHAREN: First of all, Judge, the other witness
11 that I have disclosed to defense is Fred Rice and he's a
12 reconstructionist with ISP. And I anticipated simply calling
13 him in rebuttal in terms of the evidence that might be
14 presented in the defense case in chief with their expert
15 Dr. Skelton. I don't know that I was even required to
16 discover him as a witness, but I simply did do that and I
17 anticipate only calling him at this point in my rebuttal
18 case.

19 In terms of the 911 tape, it was discovered to
20 counsel back on the 19th of July. So it was some time ago.
21 It's not new evidence, it's simply the 911 tape and it's
22 easier to hear. It's had some of the background noise taken
23 out and various audible portions are easier to hear. So it's
24 not new evidence, so it's simply evidence that's been cleaned
25 up and they have had it for some time.

1 THE COURT: The enhanced version or the tape itself?

2 MR. VERHAREN: What happened is that the original --

3 THE COURT: Is this the same tape that I reviewed?

4 MR. VERHAREN: It's the same recording, but what you
5 listened to and what he had at the preliminary hearings was a
6 cassette tape. And what Detective Maskell discovered is that
7 the 911 calls are all digital. So at some point after the
8 preliminary hearings he went and got a digital recording from
9 911. That's more clear than the recording that was on the
10 cassette. He then sent that digital record to RMIN, which is
11 an agency that will help out and do things for law enforcement
12 in certain cases. They took a portion of the tape where this
13 incident occurred and made it clearer and made certain things
14 audible that weren't audible before.

15 In terms of Mr. Adams no longer being on board here,
16 the motions in State v Duncan, I believe, were set quite some
17 time ago, just like this trial was set quite some time ago. I
18 think steps could have been taken months ago to resolve that
19 and never were. There is a lot of witnesses in this case to
20 be called by the state. I'm flying one in from Phoenix, I
21 have the plane ticket for that witness. I'm all ready to go.

22 I can tell you that the Larsen family is adamantly
23 opposed to any type of continuance here. There has already
24 been one continuance. They're finding it very difficult to
25 live with the shadow of a trial, and they very much want to

1 see this thing go forward.

2 So for those reasons I'm opposed to a continuance
3 again.

4 THE COURT: The expert that you have indicated has not
5 prepared a report yet, Miss Taylor, that's not Dr. Skelton,
6 that's the one that examined the discovery or the new
7 discovery, that is the enhanced tape?

8 MS. TAYLOR: Judge, the new experts, the Hayes Group from
9 Oregon, they have a copy of the newly enhanced 911 tape. They
10 also have copies of other materials, too. I don't think they
11 will be limited to just the 911. I expect they will do many
12 other things to assist us in this trial as well, but the 911
13 tape, the enhanced version, is important.

14 As far as the 911 tape, we appreciate having some of
15 the background noises pulled out of that, but the problem is
16 that their expert has extracted a portion of that and somewhat
17 seems to identify the extracted portion as gunshots, although
18 the report says he can't positively say they're gunshots. And
19 they're pulled out so they're not in actual time, so we don't
20 know when those things occur, and we haven't been able to
21 speak with that person, he hasn't returned Miss Fisher's phone
22 calls. That's the problem, that extracted portion of the
23 enhanced time, I don't know when those things that he's
24 thinking may be gunshots but he can't positively identify them
25 as gunshots. I don't know when those take place in that

1 tape. I think that that's kind of an important piece of

2 information for us to be able to explore

3 I wanted to respond a little bit to --

4 THE COURT: And your expert intends to explore that?

5 MS. TAYLOR: I believe that's one of the things that he's
6 going to do.

7 THE COURT: It would seem to me that if the state is
8 opposing a continuance, and if you have some late disclosure
9 of information that you're concerned about, then the court
10 probably wouldn't be particularly inclined to bar that witness
11 from coming forward and testifying. Because usually when the
12 court weighs late disclosure of evidence, the first remedy
13 would be to grant a continuance. If the state is not excited
14 about a continuance, then I suspect the court would be
15 inclined to allow under the circumstances the witness to go
16 ahead and proceed. I think there's other alternatives. I can
17 certainly allow Mr. Verharen's office an opportunity to visit
18 prior to testimony with the witness. I think there's some
19 other avenues I can explore.

20 But certainly if the state is taking a position
21 today that they're objecting to a continuance and you don't
22 get a report to the state until the eleventh hour, I'm not
23 sure that the court would be inclined to bar your witness from
24 testifying under those circumstances.

25 MS. TAYLOR: Okay.

1 THE COURT: Anyway, continue, I'm sorry.

2 MS. TAYLOR: And I appreciate that. I'm not sure when
3 they can be completely ready. We are trying to get that
4 pinned down. But as you know there is a lot of material to
5 review because it's not just the tape. There is many other
6 things. So I'm concerned about them getting it done in time
7 as well.
8 I wanted to briefly touch on the portion about
9 Mr. Adams having to pull off this case because of the Duncan
10 case. I don't know why we didn't catch, when this court set
11 this trial for August, that that was the same time as the
12 Duncan motion. I don't know why we didn't catch it. But my
13 concern is that Mr. Ellington is going to pay for our lack of
14 catching that. And he does have a right to effective
15 assistance of counsel. This is a lot of material to digest,
16 and having somebody brand new on and somebody who has been on
17 the case from day one having to pull off at the last minute
18 creates some concerns that we will be adequately prepared and
19 ready to go.

20 We're not asking for a lengthy continuance. We
21 don't want to stretch this out either. Our request would just
22 be to September, that's just a few weeks. We are not trying
23 to delay, we don't want to. Mr. Ellington is wanting to go,
24 but he also wants the best representation he can get. And
25 we don't feel like we are going to be fully prepared on

1 August 22nd.

2 THE COURT: I'm not real clear why Mr. Adams' assistance,
3 why he feels he needs to pull out. It seemed to me that the
4 hearing that he has in the Duncan matter is only for a couple
5 of days. I have already indicated that the court would
6 certainly exercise its discretion, and perhaps require the
7 state, if you have certain witnesses that Mr. Adams was going
8 to be cross-examining, that the court might be encouraging the
9 state rather strongly to hold off on those witnesses until
10 Mr. Adams was available. I think there's some other
11 alternatives that we could work with to accommodate the fact
12 that co-counsel has to be in two places at once, which is
13 certainly not uncommon around here.

14 MS. TAYLOR: Your Honor, we appreciated the
15 accommodations the court was willing to make. We talked about
16 this briefly at the last time we asked the continuance. I
17 think the press coverage that's going to happen on the Duncan
18 case, and Mr. Adams' name is going to be attached to that
19 press coverage, and then him showing up half way into
20 this trial would have an extreme prejudicial effect on
21 Mr. Ellington receiving a fair trial from the jury.

22 I think when Mr. Adams walks in three days into this
23 trial and the jury see him and goes home and reads their
24 paper, they're going to know he's one and the same Mr. Adams.
25 There is a lot of negative public sentiment with regard to

1 that case, and a lot of people don't understand the role of a
2 defense attorney and why defense attorneys file motions that
3 they file, perhaps. I think the public sentiment is
4 overwhelming in that case and would be hugely prejudicial to
5 Mr. Ellington, we can't take that chance. I just don't think
6 it would be fair at all to him to have an attorney walk in
7 half way through his trial and have that jury look at
8 Mr. Adams knowing where he had been and what he had said
9 because of the press coverage for the last three days. It
10 just can't happen that way.

11 THE COURT: Anything else, Mr. Verharen?

12 MR. VERHAREN: I think the court could order the jury not
13 to watch the news or read the paper during the trial.

14 MS. TAYLOR: Well, I think the court could order it.

15 THE COURT: Let me break just for a moment here and I'll
16 return here and deal with this. I know we have some other
17 issues we are going to cover regardless. So before I make a
18 determination as to the motion to continue, perhaps we can
19 take up some other issues here today. Have there been some
20 efforts that have been engaged in between the State and
21 Mr. Ellington through counsel to try to reach some kind of
22 resolution in this matter?

23 MR. VERHAREN: Judge, Miss Taylor and I briefly had a
24 discussion about plea negotiations, and she indicated to me
25 her client might plead guilty to misdemeanors in this case.

1 Since that time I have spoken with the family, specifically
2 with Joel Larsen who is here in the courtroom today, and he
3 has indicated to me he does not want to see anything less than
4 a murder charge go to trial in this case. And so I don't know
5 that any further negotiations would have any value at all.

6 THE COURT: I can certainly appreciate the concerns of
7 the family of the alleged victim in a case like this, and of
8 course that doesn't always control the determination of a
9 case. I had an opportunity to review the facts of this case
10 rather extensively and, quite frankly, I think that there are
11 some problems, both legal problems and factual problems for
12 the state to be able to ultimately prove the charges as
13 alleged.

14 But I think Mr. Ellington certainly has some
15 substantial problems as well that are very present in terms of
16 the facts and some of the legal issues that are in front of
17 the court. And so it would seem to me that there
18 realistically should be some reasonable room to perhaps
19 arrive at an accommodation other than the ones that I have
20 heard here that seems to be at exact opposite ends of the
21 spectrum in terms of resolution.

22 Miss Taylor.

23 MS. TAYLOR: Your Honor, I did speak with the prosecutor
24 and I don't think that we have any more room to move. I know
25 that we don't. And Mr. Chapman wants to speak. Could we have

1 a moment?

2 (Mr. Chapman and Ms. Taylor conferring)

3 THE COURT: Mr. Chapman is obviously mindful of the
4 court's rule that we only hear from one lawyer per side.

5 MS. TAYLOR: Your Honor, what we were discussing is the
6 potential maybe to attempt a mediation in this case. We are
7 aware that that has been successful recently, and perhaps that
8 is something that could be attempted in this case.

9 THE COURT: As far as other issues that are in front of
10 the court, are there any other matters that we are going to
11 have to take up? I know the court has some that I wanted to
12 discuss before we go to trial. Does the state have any other
13 issues that are going to be of concern before we are in a
14 position to get under way?

15 MR. VERHAREN: One, and I guess it's more of a
16 housekeeping matter. In terms of the witnesses here, I am
17 assuming there is going to be a motion to exclude witnesses.
18 And I'm wondering what the court's view is going to be after a
19 witness has testified, will they be allowed to remain in the
20 courtroom, specifically the Larsen family?

21 THE COURT: I suspect that will depend on whether I have
22 an objection to such a motion.

23 MS. TAYLOR: Your Honor, we will be objecting, we may
24 need to recall them depending on what we are allowed to get
25 into on cross.

1 THE COURT: Typically when there is a motion to exclude
2 witnesses, at least if it's at a trial and not a preliminary
3 hearing, the court has a lot of discretion. Typically I look
4 at the type of case that's in front of the court. If the type
5 of case involves a variety of witnesses who are testifying
6 about different areas of their own individual expertise, for
7 example, or separate independent facts that they have
8 observed, I'm not sure that an exclusion of witnesses makes a
9 lot of sense or is even necessary to assure a fair trial for
10 either the defense or the state.

11 On the other hand, if I have a singular incident
12 that was observed, witnessed by multiple individuals,
13 especially if they were laboring under either an agitated,
14 intoxicated or emotional state, then the likelihood of the
15 testimony being affected by the testimony of other witnesses
16 then, I think, becomes enhanced, and then the ability of the
17 defense and the state to get a fair trial then becomes
18 impaired. I think we have that in this particular case, if I
19 understand the facts.

20 I don't think it's a real concern when we talk about
21 accident reconstructionists. It would seem to me that, for
22 example, expert witnesses, it would be appropriate for an
23 expert witness from the defense to sit through the testimony
24 of the expert witness that's offered on accident
25 reconstruction from the state. I think that's a legitimate

1 exercise and I typically would allow that. Practically it
2 doesn't occur, because those witnesses are expensive and they
3 don't have time to wait around and listen to all of the
4 evidence that's being presented, or particularly the expert
5 testimony.

6 But when we have the two Larsen sisters and
7 Mr. Larsen, who basically, as I understand it, were present
8 when the incident that alleged in the alleged aggravated
9 batteries and the alleged homicide, and again I think that
10 clearly from listening to the tapes in this case and the
11 interviews, it was a highly agitated and emotional experience,
12 I think that it probably is going to be the court's
13 determination that witnesses should be excluded. I recognize
14 the constitutional right of victims to be present.

15 But I think that the court is going to be inclined
16 to exclude those witnesses certainly during the testimony of
17 the primary witnesses, in other words, once they have
18 testified, or one has testified, let's say Mr. Larsen
19 testifies first, then I would certainly have the two sisters
20 remain sequestered from the courtroom. Whether I'm going to
21 allow them to come back in, I think is going to depend on the
22 testimony and what the circumstances are at that point.

23 I'm going to exclude them as witnesses, to answer
24 that question. Whether or not I'm going to extend that
25 exclusion to continue after they have testified and into their

1 possible rebuttal, I think will simply depend upon the nature
2 of the testimony and the issues that might be legitimately in
3 dispute. So I think I can only answer your question half way,
4 Mr. Verharen.

5 MR. VERHAREN: That was good enough, Judge, thank you.

6 THE COURT: Any other issues that the state has?

7 MR. VERHAREN: Not any that I can think of right now,
8 Judge.

9 THE COURT: Miss Taylor, do you have any other issues
10 that we need to resolve?

11 MS. TAYLOR: Your Honor, we had filed two motions that I
12 hoped we could resolve today. I do have one other issue that
13 I did not file that I'm hoping that we can resolve today. Do
14 you want me to start with the two that are filed?

15 THE COURT: Please.

16 MS. TAYLOR: Okay, thank you. The first one that we
17 filed was a motion to allow the weapon to be fired, and we
18 would request that be done. I think it would be maybe
19 something that could be done during the jury view. It's
20 appropriate in this case, obviously Your Honor has read the
21 transcripts and listened to a lot of evidence so far in this
22 case, the tapes, the noise that gun makes is pretty important,
23 and it's appropriate for the jury to hear that and to
24 understand the testimony. We would ask that that be allowed
25 to be done during the time of the jury view. I think that's

1 an appropriate occasion.

2 The next motion is to obscure the road marker.
3 Recently counsel and I went out to Scarcello Road and there is
4 a religious shaped symbol bearing the alleged victim's name,
5 and would ask that that be obscured during the jury view time.
6 I don't know how to have that obscured properly, but I think
7 that it's appropriate that that be obscured during the jury
8 view time.

9 The next thing that I wanted to talk about is not a
10 filed motion. During the first preliminary hearing Detective
11 Maskell referred to the scene at Scarcello Road as the death
12 scene, and would ask that he not be allowed to refer to it as
13 the death scene. I think it's an inflammatory and prejudicial
14 statement and think he can call it a scene, accident scene, a
15 crash scene. I think a death scene takes it just a little too
16 far and I would ask that he not be allowed to use that phrase.

17 And the last thing that I wanted to talk about that
18 Your Honor asked us to consider waiving Mr. Ellington's
19 appearance at the jury view time for a lot of reasons, and we
20 talked about that. I think if we have just the jury and just
21 the attorneys and investigators, it probably won't speak too
22 loudly to the jury that Mr. Ellington is not present, and he
23 would be willing to waive under those circumstances.

24 What we would request is that nobody else be out
25 there, not the alleged victims' family be out there during

1 that time. We understand the state's investigator would be
2 out there, as our investigators would be out there, and we
3 understand there would be no testimony during that time. I
4 think if we waive our appearance, we would request that no
5 other witnesses, including the alleged victims' family, be out
6 there during the jury view as well. That's it today.

7 THE COURT: Maybe we can go in reverse there and perhaps
8 take up the jury view. I have granted the request to do that,
9 but I don't know exactly what the ramifications are going to
10 be behind that. But there are some things that I thought I
11 would share with counsel that the court has some concerns
12 about is the logistics of it. It's not going to be a problem
13 for the court -- well, it will be a problem, but I'm sure we
14 can arrange to get a bus to take the jury out there and bring
15 the jury back, that's not a problem. We are going to need to
16 discuss exactly what goes on out there. Typically when I have
17 done jury views, we don't talk, we don't discuss, we don't
18 point things out, we don't conduct any kind of a hearing out
19 there. We just go out there and observe that which has
20 already been discussed during the course of a trial.

21 And so again I don't know exactly what we are going
22 to do, but we may, from the evidence, establish a point on
23 Scarcello Road, for example, that can be marked between two
24 flags or whatever is necessary, go out and have the jury walk
25 that area and return to court, and they have been able to view

1 the area in question. If that's all we are going to do
2 basically, my question becomes who needs and who should
3 rightfully participate in that process. Mr. Ellington
4 obviously has a right to be at every stage of the
5 proceedings. My concern is a security concern, not for the
6 fact that he's going to flee, we certainly have methods with
7 the sheriff that can take care of that, that's not an issue.
8 I think there's under the clothing, I'm not sure the device
9 name, what the term for it is, but that's not the concern.

10 If we are doing a view, especially if it's a
11 publicized view, I'm concerned about his security, because
12 given the nature of the charge, never know, there could be
13 somebody who may want to take advantage of an unprotected
14 situation to bring harm upon Mr. Ellington, and that's an area
15 of concern, so that's an issue.

16 The other issue is that Mr. Ellington is out there,
17 I have to worry about how he's going to be out there in the
18 company of his lawyer in his civilian clothing so the jury
19 does not observe him in a custodial situation. But these are
20 all logistics that we can work on. If Mr. Ellington wishes to
21 be there, I'm certain that we could make that happen.
22 But if we're doing a rather sterile observation of the scene,
23 then his presence may not really be altogether that
24 necessary. I just had asked Miss Taylor to think about that so
25 the court can deal with those logistics, which I think we can

1 finalize as we approach at that point in time.

2 Do you have input on that issue?

3 MR. VERHAREN: Only that Mr. Larsen has indicated he
4 would like to be there as well.

5 THE COURT: I don't know that we need to resolve that
6 right now, I just wanted to put those issues that I have to
7 worry about. And when the time comes to make that motion for
8 the jury view, I'll have all the other facts in front of me
9 and then I'll put whatever restrictions that I need to put on
10 there. My main purpose was to get everybody thinking about
11 these issues and these concerns, and particularly you and your
12 client so that you knew what I was concerned about, and then
13 we'll just take it from there.

14 Anything else on that point?

15 MR. VERHAREN: No, Judge.

16 THE COURT: Again I don't think we can really resolve
17 that here today. With the other issues that have been raised
18 by Miss Taylor?

19 MR. VERHAREN: In terms of allowing the gun to be fired,
20 I'm opposed to that, Judge. I understand the defense has an
21 expert in terms of the gun, that expert is going to talk about
22 the aspects of the gun. He's going to talk about how loud the
23 gun is. In the circumstances that the jury is going to hear,
24 Mr. Ellington was in a vehicle, he had the vehicle at full
25 throttle. He was at different angles and the different

1 distances when shots were fired. And I don't think you can
2 recreate the same sound by simply having the jury at some
3 place and firing the gun. It's not going to be the same that
4 it sounded to Mr. Ellington in a vehicle that was at full
5 throttle and varying distances.

6 So you can't recreate the same thing that
7 Mr. Ellington heard. What you're going to have is a sound
8 that's probably a lot louder to the jury than it was to Mr.
9 Ellington when he was in a vehicle when he had the vehicle at
10 full throttle. So I don't see how, because it's different,
11 that it's going to be relevant. I also think that it's going
12 to be prejudicial to be firing off this gun for the jury.

13 In terms of the motion to obscure the road marker,
14 I'm opposed to that as well. The scene is going to be
15 different. There's not going to be any snow on the ground,
16 there's not going to be any snow berms. There's going to be
17 more vegetation along the side of the road. And then there is
18 this marker that the Larsen family put up. As I understand it
19 it took some time to make this. They contacted the owner of
20 the property that they put the marker up on, it's a fence,
21 they bolted it to the fence, they got the owner's permission.
22 THE COURT: I was going to ask that question. I always
23 am curious about some of these markers along the highway and
24 under what authority they have been placed there and whether
25 there is a statute that allows that or whether the highway

1 department just ignores it, whether it's on the right-of-way.

2 Apparently this is a private property issue here.

3 MR. VERHAREN: Yes, it's on private property, and I
4 understand they have the permission of the owner. First of
5 all, I don't really see the prejudice to the jury. They're
6 going to have heard all the evidence in this case and they're
7 going to know that Mrs. Larsen died there. Secondly, I don't
8 know that you have the power to obscure something that is on
9 somebody else's property, I don't know that you have
10 jurisdiction to do something like that.

11 And then the last issue here was the death scene
12 description by Sergeant Maskell. Essentially that's what this
13 is. He's not calling it a murder scene. He's not calling it
14 an extremely violent crime scene. He's calling it a death
15 scene. Whether that be a manslaughter scene or a murder
16 scene, that's what he's calling it. I don't see how that's
17 prejudicial. So I don't think you ought to exclude that.

18 THE COURT: Anything else, Miss Taylor?

19 MS. TAYLOR: Just a couple of points, Judge. As far as
20 being allowed to fire the weapon, we would have our experts
21 fire the gun with the exact same rounds that were used on this
22 occasion, and we do feel that it's important for that to be
23 done.

24 With regards to the road marker, I think you could
25 order that a large vehicle, maybe, be marked in front of it or

1 something to that effect. We are not asking that it be
2 removed, just that it be obscured so it doesn't become a focal
3 point. I just think it's prejudicial for the jury to focus on
4 that. They're there to look at the roadway, the width of the
5 roadway, the slope of the roadway, the size of that driveway,
6 the length that this all occurred in. I don't want the focus
7 to be on that. They're there to see the road and that's it.

8 And our other concern is because of the religious
9 shape of this symbol, and it has those connotations of First
10 Amendment as well.

11 With regard to Detective Maskell referring to the
12 scene as the death scene, it's just an inflammatory comment.
13 He could call it a scene, an accident scene, a crash site. I
14 think by referring to it as a death scene, everytime he says
15 scene it's just too inflammatory.

16 And that's it, thank you.

17 THE COURT: As far as the discharge of the weapon, I
18 think that's certainly a highly unusual request and I'm not
19 sure under what circumstances that it would take place. I
20 think that that's an issue that I'm not prepared to resolve
21 until we hear from your expert, and obviously done some work
22 with the weapon and perhaps can enlighten the court as to why
23 that would need to be done to help demonstrate.

24 If I understand, and I know you didn't address this
25 in detail and I think it may go back to the question on the

1 tape, that there may be some discrepancy whether noises on the
2 tape are discharge of a firearm or some other noise, and
3 perhaps that's part of the reason the discharge might be
4 helpful. I think that's a matter I'll simply reserve until we
5 hear from the expert and put it in some context so that I can
6 appreciate. I don't know that just a concept of firing off a
7 gun in front of a jury just because a gun was discharged in
8 and of itself is appropriate. So I think we're just going to
9 have to defer a determination on that until we hear from the
10 defense expert who apparently has examined or discharged the
11 weapon so I have some better perspective as to why it would be
12 critical to Mr. Ellington's defense.

13 As far as the obscuring of this roadside marker, I
14 can appreciate Mr. Ellington's concern because there certainly
15 could be some prejudicial impact in terms of emphasis on an
16 emotional response with the jury if we have a memorial of
17 sorts that is out there at the scene. But as Mr. Verharen
18 points out, I don't know that the court really has a lot of
19 authority if we are dealing with private property. That's
20 why I wanted to ask that question earlier, and that is that
21 I didn't know if we were just dealing with a highway
22 right-of-way, in which case then the court might be in a
23 better position to exercise some authority to obscure that in
24 some fashion. But if we have a piece of private property that
25 has some demonstrative monument that is a concern for this

1 in some other context with some kind of emotional emphasis,
2 then I think the court would certainly step in and impose an
3 emphasis.

4 I would certainly agree that it shouldn't be
5 referred to by anybody as a murder scene or in any other
6 conclusory fashion. But if it's simply referred to a death
7 scene, particularly once it's established that there was a
8 death that occurred there, I don't know that the court is
9 prepared to conclude that that's so unduly prejudicial that it
10 should be barred from consideration by the jury.

11 Have I covered everything to the extent that I can
12 right now? I don't know if I have missed any of the motions
13 thus far.

14 MS. TAYLOR: I think you have got it for today.

15 THE COURT: Any other questions or issues that we need to
16 take up currently?

17 MR. VERHAREN: Not from the state.

18 THE COURT: The case again is set to run for two full
19 weeks. I understand that, Mr. Verharen, you're not sure how
20 much the defense is going to put on, but basically we are
21 still planning for that two week time frame? Do we know
22 approximately at what stage of this case the defense is
23 actually going to make their request for the view, since I
24 think the request for the view is basically part of the
25 defense's presentation?

1 jury view, I don't think that the court is in any position to
2 tamper with that or touch that.

3 If the defense wants to go out there and formulate
4 some kind of a nonintrusive method to shield that from view of
5 the jury, if they can, provided it doesn't alter our scene out
6 there or our ability to observe it, then I can give some
7 consideration to that. I don't think the court needs to get
8 into an infringement on somebody's private property rights to
9 demonstrate whatever they're trying to demonstrate, if that's
10 where this thing is located. So I don't think the court is in
11 much of a position to do that.

12 If you can satisfy me that there is a way to block
13 this off from view of the jury, the jury can see that which
14 they need to see out there, I'll certainly give consideration
15 to allowing that request. But I don't know exactly what the
16 proposal is or how it may or may not impair the scene.

17 As far as Detective Maskell being admonished from
18 referring to the scene in certain fashions, I think officers
19 typically may refer to a scene as fatality, scene of a
20 fatality or scene of a death. I don't know that I'm willing
21 to reach the conclusion that that may be overtly prejudicial
22 to the defendant's cause. That depends on the manner in which
23 Detective Maskell is going to do this. If it's simply a
24 casual reference in the course of his professional testimony,
25 I don't think I have a problem with that. But if it comes out

1 MS. TAYLOR: It would be towards the end, Judge. We will
2 have our gun expert testify and our other experts testify. I
3 would think that it won't be the very last thing we do but
4 towards the end of our case.

5 THE COURT: That would be my assumption but I wanted to
6 make sure.

7 MS. TAYLOR: Judge, we're concerned that it may last
8 longer than two weeks. Videotapes, the jury view, and
9 anticipated testimony from our perspective. I think there's a
10 possibility we could need a few extra days. I think we have
11 nine right now.

12 THE COURT: I think I already anticipated that from our
13 prior discussions. Anything else?

14 MR. VERHAREN: I think we can do it in two weeks.

15 THE COURT: Pardon?

16 MR. VERHAREN: I think we can do this case in two weeks.

17 THE COURT: Always want to make sure that we advise the
18 jury accordingly, because we don't want the jury to be upset
19 with us if we take more time than we tell them. Always better
20 to keep them on notice that they might be expected to be here
21 longer, and if it comes out shorter, then they're much easier
22 to work with and that assures a more appropriate atmosphere
23 for resolution.

24 Anything else before I take a break and then I'll
25 come back and ponder the continuance request?

1 MS. TAYLOR: Judge, will you have law days during the
2 time of the trial?
3 THE COURT: I will.
4 MS. TAYLOR: Yes?
5 THE COURT: I do, yes.
6 MS. TAYLOR: Then we definitely need more than the nine
7 days.
8 THE COURT: Beginning at 8:30 and terminating at 3:30
9 each day is typically the routine.
10 MS. TAYLOR: And we observe a lunch hour in this
11 courtroom?
12 THE COURT: Yes.
13 MS. TAYLOR: I think we will probably need more than nine
14 days if we are cutting out at 3:30 every day.
15 THE COURT: I appreciate that input and I'll give some
16 consideration to that. I'm still a little bit at awe why it
17 needs to take that long, but we'll monitor that as we
18 proceed. I appreciate the input to prepare accordingly.
19 Let me take a few minutes and then we'll come back.
20 (RECESS)
21 THE COURT: Appreciate counsel's patience, I wanted to
22 take an opportunity to ponder the request here for a
23 continuance. I had to consider some of the comments made
24 here today and review the court's schedule. The court can
25 always make some adjustments on its schedule if I felt that

1 foundation as to why the tape is an accurate portrayal of what
2 went on in a lot of the other evidence that we have. And so I
3 think the state certainly is going to have to establish that
4 foundation before it's admitted. If the defense feels they
5 need an expert to further evaluate that, and I have already
6 pointed out that if that report is not ready until the last
7 minute and the state objects to a continuance, then the court
8 is inclined to allow that tape to be in, because I think the
9 continuance would be the normal response to a late disclosure
10 of material evidence. But I think the state may very well
11 have sacrificed that concern here, or at least that level of
12 an argument for that concern. So I don't know that that issue
13 is overwhelming here in terms of a basis to continue the
14 matter.

15 Mr. Adams' participation in this case has also been
16 raised as an issue to continue the case. First of all, while
17 Mr. Ellington is certainly charged with some serious
18 allegations here, and certainly appears to be reasonable and
19 appropriate to provide him with assistance of two attorneys
20 from the office of the public defender, I'm not aware of any
21 authority or any specifics in this particular case that
22 basically entitle him to that dual representation. Certainly
23 a good idea, but I don't think that there is an absolute
24 entitlement to that under the law.

25 Furthermore, as I have indicated, I have already

1 it was appropriate to continue the matter to insure that
2 Mr. Ellington had a fair opportunity for his trial in this
3 case.
4 I looked at the request here to continue the
5 matter. The case is in a posture to proceed. We have
6 witness subpoenas out. We haven't been presented with any
7 difficulties that any of the multiple witnesses what will be
8 appearing in this case cannot be available, and transportation
9 arrangements have already been made.
10 Some issues have been raised by Mr. Ellington here
11 of concern. The first one involves the disclosure of the tape
12 by the state which is basically the enhanced version of the
13 911 call. As I have addressed that previously, I'm not
14 satisfied that that tape in and of itself really creates any
15 unexpected or anticipated information. That enhanced tape is
16 not going to be admitted until the proper foundation is laid.
17 And in this particular case it seems to me we have a
18 number of parties to that telephone conversation. I want to
19 say Joleen, not Jovon, but I think Joleen was on one line of
20 the telephone. The dispatcher was on the other side of the
21 phone. Jovon, I believe, was present when this communication
22 was taking place. Things were happening and I think Mr.
23 Larsen may have been present as Mr. Ellington was allegedly
24 present while all these things were going on.
25 The experts will certainly have to lay the proper

1 prepared to make some accommodations for the delay in the
2 start if Mr. Adams is still going to participate, and I think
3 the court can still deal with those accommodations.
4 Finally, there's been an issue about Mr. Adams'
5 representation of Joseph Duncan, who obviously has been
6 characterized as a disparaging and highly volatile criminal
7 case that's pending here in Kootenai County, and those motions
8 will be simultaneous to the trial in this case. I've been
9 asked to basically make a quantum leap here that simply
10 because Mr. Adams is appearing here on behalf of Mr. Ellington
11 that then somehow the jury is going to hold that against
12 Mr. Ellington. I don't have any information that really
13 establishes that one way or the other.

14 I don't think just because if we had Jerry Spence,
15 who arguably has never lost a case, come into this court, I
16 don't think Mr. Verharen would get too far telling me that
17 that's prejudicial because the jury will look at Mr. Spence in
18 his cowboy hat and automatically acquit the defendant because
19 they know that's what happens. I don't think reputation or
20 involvement in high profile cases automatically leads to jury
21 prejudice. If such jury prejudice, because of the unique
22 nature of the Duncan case is present, I think that can
23 certainly be explored during the course of voir dire
24 examination.

25 If we have issues when we are trying to pick a jury

1 because the jury don't feel that they can be fair to
2 Mr. Ellington because Mr. Adams is part of the defense team or
3 the office, then I think we can explore that and deal with
4 that as the time comes.

5 And so while the request for the delay here is not
6 really a significant delay, and while the state has opposed it
7 in part because Mr. Larsen and the family have opposed it,
8 which I don't think is going to be compelling here to the
9 court, nonetheless I'm not satisfied that there's any real
10 compelling reason to otherwise delay the course of this trial
11 that is currently set to proceed.

12 So after having considered those factors, I'm going
13 to deny the request for a continuance. We will still be in
14 place to commence on the 22nd of August at nine o'clock in the
15 morning.

16 Any questions from the state?

17 MR. VERHAREN: No, Judge.

18 THE COURT: Any questions, Miss Taylor?

19 MS. TAYLOR: No, Judge.

20 THE COURT: Miss Taylor, if you will go ahead and prepare
21 an order on the motions that the court has addressed to the
22 extent that I have addressed them here today. I think I have
23 deferred ruling on the firearms charge, so I don't think you
24 need an order in that. I have denied the motion to prohibit
25 the detective from making reference to the death scene.

1 Perhaps an order can be prepared on that motion. The request
2 to obscure the road markers, again that's going to depend on
3 what can be presented to the court at the time of the view. I
4 guess I have deferred ruling on that matter. I'll just take
5 your proposed order and then I'll put down that I have
6 deferred ruling on that to save you the effort.

7 MS. TAYLOR: Your Honor, do you have only the proposed
8 order on the road marker?

9 THE COURT: That's the one that I'm seeing in the court
10 file. Did you prepare a proposed order on the --

11 MS. TAYLOR: On the firing of the weapon, well, I thought
12 I did. I'll get one over to you.

13 THE COURT: All right. Anything else?

14 MR. VERHAREN: No, Judge.

15 THE COURT: With that we will be in recess.

16 (Proceedings concluded on August 10, 2006.)

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1 AUGUST 21, 2006, 3:30 O'CLOCK P.M.

2 THE COURT: Good afternoon. This is district court, I'm
3 Judge Luster. This is the time scheduled for hearing in
4 various criminal matters. Actually I have two cases that are
5 left. I know Mr. Nelson wanted to go first, but I think our
6 Ellington matter is just going to take a second, and maybe we
7 can take that up.

8 Miss Taylor and Mr. Chapman are representing
9 Mr. Ellington. And Mr. Verharen is here on behalf of the
10 state.

11 This matter was scheduled on a motion to compel.

12 Miss Taylor, I notice your client is not present.

13 MS. TAYLOR: I waive his presence.

14 THE COURT: I was advised that you were going to waive
15 his presence for purpose of this hearing today, is that
16 correct?

17 MS. TAYLOR: Yes, Judge.

18 THE COURT: So are you ready to proceed on your motion?

19 MS. TAYLOR: Yes, Judge.

20 THE COURT: Mr. Verharen, is the state ready to proceed?

21 MR. VERHAREN: Yes, sir.

22 THE COURT: Go ahead, Miss Taylor.

23 MS. TAYLOR: Thank you, Judge.

24 Your Honor, we filed the motion to compel to
25 complete discovery in this case, and Mr. Verharen complied

1 with everything that he had; however, what we are missing
2 would be reports from two experts he plans to call.
3 Sean Daly was called at the second preliminary hearing, and
4 we're missing his report, as well as Fred Rice. I understand
5 that they haven't written any. But we would request that we
6 be disclosed the content of their opinions and their analysis
7 and what that's based on so we can prepare properly for trial.

8 THE COURT: Mr. Verharen.

9 MR. VERHAREN: Judge, in terms of Detective Daly's
10 opinion, that has been made clear in the transcript of the
11 preliminary hearings when he was extensively questioned by
12 myself as well as counsel. I don't know yet what the opinion
13 of the other witness Fred Rice is going to be, I suspect it's
14 going to be the same as Detective Daly's, but I don't think he
15 intends on reading a report. I have submitted to counsel
16 phone numbers to contact him, his address to contact him and
17 I'm sure that he would answer any questions that were posed to
18 him about this matter.

19 THE COURT: Was that Mr. Rice?

20 MR. VERHAREN: Fred Rice down in Boise.

21 THE COURT: Was he the gentleman that you had indicated
22 the other day during the hearing that he was going to be
23 appearing as a rebuttal witness?

24 MR. VERHAREN: Yes, sir.

25 THE COURT: So I trust you're not fully sure what the

1 witness would testify to until you hear the case in chief?
 2 MR. VERHAREN: Not fully sure. When I met with him he
 3 had just received all the materials and went out to the
 4 scene. He hadn't read all the materials. But I am assuming
 5 he's going to state essentially the same things that Detective
 6 Daly came up with. He is available by phone to answer any
 7 questions from counsel.

8 THE COURT: Anything else additional, Miss Taylor?

9 MS. TAYLOR: Your Honor, as I understand it, Mr. Verharen
 10 plans to call him in a rebuttal case. But if he's going to
 11 testify in his expert capacity, I think we are entitled to the
 12 basis of his opinion if we request it, and we have, and we
 13 are. Even if he's a rebuttal witness, if he is testifying as
 14 an expert, I think we get to know the basis of his opinion and
 15 what that opinion is, and that's what we're requesting.

16 THE COURT: It seems that the state has, well, I'm a
 17 little befuddled because Mr. Verharen seems to indicate he
 18 doesn't know what this witness is going to testify to other
 19 than his assumption it's going to be the same thing that
 20 Detective Daly had testified to, is that correct?

21 MR. VERHAREN: Yes. Let me put it this way, he didn't
 22 indicate anything different than what Detective Daly said when
 23 I met with him, but he hadn't reviewed the reports, he hadn't
 24 reviewed all the photographs, he hadn't reviewed the
 25 preliminary hearing transcripts. But he didn't say anything

1 different to me.

2 THE COURT: When do you anticipate Mr. Rice testifying,
 3 only on rebuttal?

4 MR. VERHAREN: Only on rebuttal. So I don't know that I
 5 was even required to disclose him to counsel in the first
 6 place.

7 THE COURT: And in the state's case in chief you expect
 8 to take at least three to four days, and that's a rather
 9 generous estimation?

10 MR. VERHAREN: Three, four days off?

11 THE COURT: Of the state's case?

12 MR. VERHAREN: At least.

13 THE COURT: Anything else?

14 MS. TAYLOR: Not on that issue, Judge.

15 THE COURT: It's a little difficult to rule on it.
 16 Certainly the defense is entitled to disclosure of the
 17 information. If it's only going to be testimony in rebuttal,
 18 then I guess the question remains exactly what that testimony
 19 will be. The testimony will be in response to whatever
 20 testimony the defense may put on on that question. If the
 21 state has disclosed the witness's name and phone number to
 22 contact the witness, and unless the witness is simply
 23 uncooperative, I don't think we have a real problem here. I
 24 think the state has met their obligation and counsel is
 25 certainly free to visit with Mr. Rice to find out what the

1 source of any of his opinions are going to be.

2 The only problem that I can imagine, and that's the
 3 pessimist in me, that is that if he testifies contrary to what
 4 he may have orally represented to defense counsel, that could
 5 create a problem. And so at this time the record will reflect
 6 that the disclosure is that he information, the basis of the
 7 information of the testimony of Mr. Rice will be consistent
 8 with Trooper Daly's. So that's the scope of the disclosure.

9 Obviously defense counsel has an obligation to
 10 follow up and visit with the witnesses to confirm that.

11 If we find that Mr. Rice deviates substantially from
 12 what Officer Daly has testified to or what he's represented to
 13 defense counsel, then I think it might be an issue that we may
 14 have to revisit, and perhaps even approach some other means of
 15 dealing with the testimony. But right now I think the state
 16 has made a representation for the record as to what he's going
 17 to testify to, and the basis of that which would be similar to
 18 Detective or Trooper Daly, and has made a disclosure of a
 19 contact number. If counsel is having some problems
 20 communicating with Mr. Rice, let the court know and then I
 21 think the state could have some difficulties calling him as
 22 witness if he's not cooperative.

23 Any questions, Miss Taylor?

24 MS. TAYLOR: No, thank you, Judge.

25 THE COURT: Any questions, Mr. Verharen?

1 MR. VERHAREN: No, Judge.

2 THE COURT: Anything else to raise today?

3 MS. TAYLOR: No, Judge, thank you.

4 THE COURT: Counsel, I know we visited on some other
 5 logistic matters back in chambers. Again I don't think any of
 6 these are subject to any necessary ruling here, they were just
 7 logistical matters on how we are going to run our trial. We
 8 will get under way, tomorrow the jury will be here at 8:30.
 9 I'll meet counsel here at 8:30 as well and we'll see if we
 10 have any other issues that we can to hammer out to help move
 11 things along.

12 Anything else?

13 MS. TAYLOR: Your Honor, we will be bringing an extension
 14 to this table. I had hoped to move table closer to that one
 15 and move the podium out just so that somebody can get by and
 16 walk to the witness stand as they need to, is that going to be
 17 acceptable?

18 THE COURT: That will be. Matter of fact, if we can get
 19 everything in position before we get our jury selected,
 20 because I think the camera crews that are interested in this
 21 proceeding are going to come and set up after the jury is
 22 selected. And so if we have the tables and the podium all
 23 positioned in the fashion we will be using it, then they will
 24 have to deal with us.

25 MS. TAYLOR: Thank you.

1 MR. CHAPMAN: Judge, could we get a, sometime, and maybe
2 you have done it but I haven't seen it, a copy of your order
3 regarding the cameras in the courtroom issue?

4 THE COURT: You can. I have not put pen to paper yet. I
5 visited with the powers to be with the rules that I'm
6 imposing, and I'm going to document that here at the end of
7 our proceedings this afternoon, and I'll make sure you have a
8 copy in the morning.

9 MR. CHAPMAN: Thank you, Judge.

10 THE COURT: Anything further?

11 MR. VERHAREN: No, Judge.

12 (Proceedings concluded on August 21, 2006.)
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1 AUGUST 22, 2006, 9:00 O'CLOCK A.M.

2 (Following voir dire examination, counsel exercising
3 peremptory challenges, a jury of 14 was duly impaneled and
4 sworn)

5 (Whereupon court proceedings were as follows:)

6 THE COURT: As far as the 14 of you that have been
7 selected, we will be excusing you as well here shortly, but I
8 need to go over a few things with you before I do that. Some
9 of those are going to be housekeeping measures. Some of the
10 other items I'm going to be giving you some preliminary
11 instructions on the law that apply to your duties as jurors.
12 When we get that done, we will excuse you. And then tomorrow
13 morning we will come back at 8:30 and we'll get under way with
14 our opening statements and then the presentation of the
15 evidence.

16 As I told you earlier, of course I have introduced
17 Mr. Flock to you and I don't think I need to go over his role
18 here in terms of assisting you, that will be rather invaluable
19 here throughout the course of the trial. If you have any
20 concerns, please relate them to Mr. Flock.

21 The schedule that we're going to try to follow, and
22 I'll tell you right up front, schedules are meant to be broken
23 and things happen when we have witnesses that we're trying to
24 coordinate. For the most part we will try to get under way at
25 8:30 every morning. We'll be breaking at about 3:30 in the

1 afternoon because I have other matters to attend to.

2 This Friday is going to be a little different
3 because my normal matters that I hear in the afternoon, on
4 Fridays I hear early in the morning. So we'll probably be
5 starting a little later, and usually on Fridays we like to go
6 a little later. We're not going to work past 3:30, 3:45,
7 though, on Friday. We have a new district judge, Judge
8 Haynes, who is going to be sworn in, and it's my pleasure to
9 be asked to swear Judge Haynes in, and that ceremony is going
10 to take place next door at 4 o'clock, so we are going to have
11 to adjourn in time for that ceremony to take place. So that's
12 kind of an unusual interference with our process. That's how
13 this week will run.

14 And then next week we will try to stay to the
15 schedule of 8:30 in the morning running until about 3:30,
16 4 o'clock maybe, each day.

17 Now, if we have witnesses we're trying to complete,
18 we will certainly move into my matters in the afternoon, and
19 if we get to a point where I think we can get this case done
20 in a reasonable fashion, we might put it on a little faster
21 track. But we have to be careful there because my experience
22 is that jurors can only absorb that which they can endure as
23 they sit and watch the proceedings. And so if I force you to
24 sit here here 6, 7, 8 hours a day, you're not going to be able
25 to give the parties a fair consideration of the evidence. And

1 so my experience is usually, with the schedule, that gives you
2 enough time to try to listen and attentively consider the
3 evidence that will be presented to you.

4 But that's generally the schedule that we will be
5 trying to stick to.

6 As far as the instructions, I do have some
7 preliminary instructions on the law that I will present to you
8 that cover your duties as jurors. When we are done with
9 those, we will go ahead and excuse you. I don't know if Rick
10 has some questions to visit with you afterwards, but he will
11 take charge of you. Before we do that, though, I do need to
12 have our jurors stand and raise your right hand so the clerk
13 can administer the oath of trying this case now.

14 THE CLERK: Do you solemnly swear you will well and truly
15 try this cause and true verdict render according to the law
16 and evidence, so help you God?

17 (Affirmative responses)

18 THE COURT: The other item that I meant to mention to you
19 is that for those of you who are aware, I think most of you
20 are, that when we try a case we use 12 jurors to decide a
21 case. I have 14 here. And the reason for that is in the
22 event we have an accident or somebody's health turns south
23 significantly, then we would have the ability to call on an
24 extra juror or two if necessary. Hopefully that won't happen
25 because we need our jurors' attention and attendance on a

1 regular basis every day. But that's kind of our insurance
2 policy just in the event something occurs.

3 However, we don't want you to get the wrong
4 impression here, Ms. Woods or Ms. Shriner, that you are the
5 ones that are the extra jurors, that's not how it works. What
6 we do is when the case is all done and everything is presented
7 to you folks, if we have 14 healthy jurors still sitting there
8 waiting to deliberate, then we will pull two names out of the
9 hat, and those two jurors will basically be excused and then
10 we will go with the remaining 12 jurors to actually decide the
11 case. I don't want anybody to think they don't have to pay as
12 much attention as the rest of them, it doesn't quite work that
13 way.

14 With that out of the way, I'll provide you folks
15 with some preliminary jury instructions and then we will get
16 you excused for the day.

17 Now that you have been sworn as jurors to try this
18 case, I want to go over with you what will be happening. I
19 will describe how the trial will be conducted and what we will
20 be doing. At the end of the trial, I will give you more
21 detailed guidance on how you are to reach your decision.

22 Because the state has the burden of proof, it goes
23 first. After the state's opening statement, the defense may
24 make an opening statement, or may wait until the state has
25 presented its case.

1 The state will offer evidence that it says will
2 support the charges against the defendant. The defense may
3 then present evidence, but is not required to do so. If
4 defense does present evidence, the state may then present
5 rebuttal evidence. This is evidence offered to answer the
6 defense's evidence.

7 After you have heard all of the evidence, I will
8 give you additional instructions on the law. After you have
9 heard the instructions, the state and defense will each be
10 given time for closing arguments. In their closing arguments,
11 they will summarize the evidence to help you understand how it
12 relates to the law. Just as the opening statements are not
13 evidence, neither are the closing arguments. After the
14 closing arguments, you will leave the courtroom together to
15 make your decision. During your deliberations, you will have
16 with you my instructions, the exhibits admitted into evidence
17 and any notes taken by you in court.

18 Your duties are to determine the facts, to apply the
19 law set forth in my instructions to those facts, and in this
20 way decide the case. In so doing, you must follow my
21 instructions regardless of your own opinion of what the law is
22 or should be, or what either side may state the law to be.
23 You must consider them as a whole, not picking out one and
24 disregarding others. The order in which the instructions are
25 given has no significance as to their relative importance.

1 The law requires that your decision be made solely upon the
2 evidence before you. Neither sympathy nor prejudice should
3 influence you in your deliberations. Faithful performance by
4 you of these duties is vital to the administration of justice.

5 In determining the facts, you may consider only the
6 evidence admitted in this trial. The evidence consists of the
7 testimony of the witnesses, the exhibits offered and received,
8 and any stipulated or admitted facts. The production of
9 evidence in court is governed by rules of law. At times
10 during the trial, an objection may be made to a question asked
11 a witness, or to a witness's answer, or to an exhibit. This
12 simply means that I am being asked to decide a particular rule
13 of law. Arguments on the admissibility of evidence are
14 designed to aid the Court and are not to be considered by you
15 nor affect your deliberations. If I sustain an objection to a
16 question or to an exhibit, the witness may not answer the
17 question or the exhibit may not be considered. Do not attempt
18 to guess what the answer might have been or what the exhibit
19 might have shown. Similarly, if I tell you not to consider a
20 particular statement or exhibit, you should put it out of your
21 mind and not refer to it or rely on it in your later
22 deliberations.

23 During the trial I may have to talk with the parties
24 about the rules of law which should apply in this case.
25 Sometimes we will talk here at the bench. At other times

1 I will excuse you from the courtroom so that you can be
2 comfortable while we work out any problems. You are not to
3 speculate about any such discussions. They are necessary from
4 time to time and help the trial run more smoothly.

5 Some of you have probably heard the terms
6 circumstantial evidence, direct evidence and hearsay evidence.
7 Do not be concerned with these terms. You are to consider all
8 of the evidence admitted in this trial.

9 However, the law does not require you to believe all
10 the evidence. As the sole judges of the facts, you must
11 determine what evidence you believe and what weight you attach
12 to it.

13 There is no magical formula by which one may
14 evaluate testimony. You bring with you to this courtroom all
15 of the experience and background of your lives. In your
16 everyday affairs you determine for yourselves whom you
17 believe, what you believe, and how much weight you attach to
18 what you are told. The same considerations that you use in
19 your everyday dealings in making these decisions are the
20 considerations which you should apply in your deliberations.

21 In deciding what you believe, do not make your
22 decision simply because more witnesses may have testified one
23 way than the other. Your role is to think about the testimony
24 of each witness you heard and decide how much you believe of
25 what the witness had to say.

1 A witness who has special knowledge in a particular
2 matter may give an opinion on that matter. In determining the
3 weight to be given such opinion, you should consider the
4 qualifications and credibility of the witness and the reasons
5 for giving the opinion. You are not bound by such opinion.
6 Give it the weight, if any, to which you deem it entitled.

7 Under our law and system of justice the defendant
8 in a criminal action is presumed to be innocent. This
9 presumption places upon the state the burden of proving the
10 defendant guilty beyond a reasonable doubt. Thus, a
11 defendant, although accused, begins the trial with a clean
12 slate with the evidence against the defendant. If, after
13 considering all of the evidence and any instructions on the
14 law, you have a reasonable doubt as to the defendant's guilt,
15 you must return a verdict of not guilty.

16 Reasonable doubt is defined as follows: it is not
17 mere possible doubt because everything relating to human
18 affairs, and depending on moral evidence, is open to some
19 possible or imaginary doubt. It is the state of the case
20 which, after the entire comparison and consideration of all
21 the evidence, leaves the minds of the jurors in that condition
22 that they cannot say they feel an abiding conviction, to a
23 moral certainty, of the truth of the charge.

24 If during the trial I may say or do anything which
25 suggests to you that I am inclined to favor the claims or

1 positions of any party, you will not permit yourself to be
2 influenced by any such suggestions. I will not express nor
3 intend to express, nor will I intend to intimate, any opinion
4 as to which witnesses are or are not worthy of belief; what
5 facts are or are not established; or what inferences should be
6 drawn from the evidence. If any expression of mine seems to
7 to indicate an opinion relating to any of these matters, I
8 instruct you to disregard it.

9 Do not concern yourself with the subject of penalty
10 or punishment. That duty must not in any way affect your
11 verdict. If you find the defendant guilty, it will be my duty
12 to determine the appropriate penalty or punishment.

13 If you wish, you may take notes to help you remember
14 what witnesses said. If you do take notes, please keep them
15 to yourself until you and your fellow jurors go to the jury
16 room to decide the case. You should not let note-taking
17 distract you so that you do not hear other answers by the
18 witnesses. When you leave at night, please leave your notes
19 in the jury room.

20 If do you not take notes, you should rely on your
21 own memory of what was said and not be overly influenced by
22 the notes of other jurors. In addition, you cannot assign to
23 one person the duty of taking notes for all of you.

24 It is important that as jurors and officers of this
25 court you obey the following instructions at any time you

1 leave the jury box, whether it be for recess of the court
2 during the day or when you leave the courtroom to go home at
3 night.

4 First, do not talk about this case either among
5 yourselves or with anyone else during the course of the
6 trial. You should keep an open mind throughout the trial and
7 not form or express an opinion about the case. You should
8 only reach your decision after you have heard all of the
9 evidence, after you have heard my final instruction and after
10 the final arguments. You may discuss this case with the other
11 members of the jury only after it is submitted to you for your
12 decision. All such discussion should take place in the jury
13 room.

14 Second, do not let any person talk about this case
15 in your presence. If anyone does talk about it, tell them
16 that you are a juror on the case. If they won't stop talking,
17 report that to the bailiff as soon as you are able to do so,
18 and you should not tell any of your fellow jurors about what
19 has happened.

20 Third, during this trial do not talk with any of the
21 parties, their lawyers or any witnesses. By this, I mean not
22 only do not talk about the case, but do not talk at all, even
23 to pass the time of day. In no other way can all the parties
24 be assured of the fairness that they are entitled to expect
25 from you as jurors.

1 Fourth, during this trial do not make any
2 investigation of this case or inquiry outside of the courtroom
3 on your own. Do not go anyplace mentioned in the testimony
4 without an explicit order from me to do so. You must not
5 consult any books, dictionaries, encyclopedias or any source
6 of information unless I specifically authorize you to do so.

7 Fifth, do not read about the case in the
8 newspapers. Do not listen to radio or television broadcasts
9 about the trial. You must base your verdict solely on what is
10 presented in court and not upon any newspaper, radio,
11 television or other account of what may have happened.

12 Due to the fact that we will have some degree of
13 publicity attached to this case, I'm going to repeat that for
14 the benefit of the jurors.

15 Do not read about this case in the newspapers. Do
16 not listen to radio or television broadcasts about the trial.
17 You must base your verdict solely on what is presented in
18 court and not upon any newspaper, radio, television or other
19 account of what may have happened.

20 You are instructed that the defendant, Jonathan Wade
21 Ellington, is charged in Count I, with the crime of Murder in
22 the Second Degree alleged to have been committed as follows:
23 That the defendant, Jonathan Wade Ellington, on or about the
24 1st day of January of 2006, in the county of Kootenai, state
25 of Idaho, did willfully, unlawfully, deliberately, and with

1 malice aforethought, but without premeditation, kill and
2 murder Vonette L. Larsen, a human being, by striking and
3 driving over Vonette L. Larsen with a vehicle inflicting
4 injuries from which she died. To this charge, the defendant
5 has pled not guilty.

6 You are instructed that the defendant, Jonathan Wade
7 Ellington, is charged in Count II with the crime of Aggravated
8 Battery, alleged to have been committed as follows: That the
9 defendant, Jonathan Wade Ellington, on or about the 1st day of
10 January of 2006, in the county of Kootenai, State of Idaho,
11 did commit a battery upon Joleen Larsen by means of a deadly
12 weapon and/or instrument, to-wit: a vehicle. To this charge
13 the defendant has pled not guilty.

14 You are instructed that the defendant, Jonathan Wade
15 Ellington, is charged, in Count III with the crime of
16 Aggravated Battery, allegedly committed as follows: That the
17 defendant, Jonathan Wade Ellington, on or about the 1st day of
18 January of 2006, in the county of Kootenai, state of Idaho,
19 did commit a battery upon Jovon Larsen by means of a deadly
20 weapon and/or instrument, to-wit: A vehicle. To this charge
21 the defendant has pled not guilty.

22 The Information in this case is of itself a mere
23 accusation or charge against the defendant and does not of
24 itself constitute any evidence of the defendant's guilt; you
25 are not to be prejudiced or influenced to any extent against

1 the defendant because a criminal charge has been made.
 2 Members of our jury, that concludes the presentation
 3 of our instructions. I think that will be the end of our day
 4 today. We will be back here tomorrow morning at 8:30. I have
 5 given you some admonishments about talking about the case, and
 6 so forth, keep those in mind, obviously. Otherwise we will
 7 see you folks back here tomorrow morning at 8:30 and we will
 8 get under way at that time.

9 Again, we will be starting tomorrow, I think you
 10 have a little notice about calling in after 4, do not call in
 11 to the bailiff's station. What they will have is a little
 12 recording to say don't show up for jury service tomorrow
 13 because jury service is over. You folks are it. We've had
 14 that happen where you call in and then you don't show up
 15 because of that message. Don't bother to call in. If you're
 16 not suppose to be here either I'll let you know or Mr. Flock
 17 will let you know, but we'll see you tomorrow at 8:30.

18 With that, thank you, folks, we'll see you tomorrow.
 19 And I think with that we're done for the day, we'll see you
 20 folks here tomorrow at 8:30.

21 I'm going to take a brief recess and we'll collect
 22 our law day files for 3:30.

23 (Concludes proceedings on August 22, 2006)
 24
 25

1 AUGUST 23, 2006, 8:30 O'CLOCK A.M.

2 (WITHOUT THE JURY PRESENT)

3 THE COURT: Good morning, I believe we're ready to get
 4 under way in the matter of State of Idaho versus Jonathan
 5 Ellington. 06-1497. Before we get under way with our
 6 opening statements, I met with counsel in chambers and I think
 7 we have a few issues that we need to address. I know we
 8 didn't put these issues on the record. Let me see if I can't
 9 streamline them, and if counsel feels there is a correction
 10 that we need to make, then certainly we can deal with that
 11 appropriately.

12 First of all, just to be clear, yesterday there were
 13 informal discussions, and I'm not even sure if it was on the
 14 record or not, but just to be on the safe side, the defense
 15 was concerned that the state in their opening statement would
 16 be making detailed descriptions of photographs that may be
 17 offered as evidence in the case, and the defense had objected
 18 to the state proceeding in that fashion during their opening
 19 statement.

20 I believe Mr. Verharen assured the court that was
 21 not his intent, and the court advised counsel that it would
 22 enter a ruling that such descriptive detail of evidence that's
 23 not admitted would be improper opening statement. And so the
 24 court would grant that motion, as it were, that was presented
 25 informally to the court yesterday.

1 There was a second motion, this was brought to the
 2 court's attention by the state. Apparently the Larsen family
 3 or someone within the Larsen family has filed a tort claim
 4 regarding this matter with the County, I believe, pertaining
 5 to the county sheriff's department behavior, for lack of a
 6 more specific explanation. Mr. Verharen will be seeking to
 7 exclude any reference to that during the course of this
 8 trial. That issue will not be taken up until it's necessary
 9 when the witness, that is, one of the Larsens is on the
 10 witness stand. Until then, however, the court has agreed that
 11 any reference to that tort claim filing would be prohibited in
 12 opening statements, and I believe Miss Taylor advised the
 13 court she was not intending to do that. That would, of
 14 course, be a court directive and I'd grant the state's motion
 15 on that point.

16 Am I clear on those two issues as far as you
 17 understand, Mr. Verharen?

18 MR. VERHAREN: Yes, sir.

19 THE COURT: And Miss Taylor?

20 MS. TAYLOR: Yes, Your Honor.

21 THE COURT: We have some other logistical problems. I
 22 believe our bailiff received a phone call from juror Broughton
 23 last night who, all of a sudden, has come to the realization
 24 that she's unable to proceed because of her seven children at
 25 home are out of control or something to that effect.

1 BAILIFF MR. FLOCK: Yes, sir.

2 THE COURT: We will inquire of Miss Broughton in a just a
 3 moment.

4 And then I believe there were two other issues that
 5 I'll need to address to the jury that counsel brought to my
 6 attention. Apparently yesterday one of our jurors who had
 7 been excused was overheard articulating an opinion in front of
 8 protective jurors and jurors that have been selected about the
 9 guilt or innocence of Mr. Ellington that would appear to have
 10 been improper. I think the facts of that allegation are a
 11 little fuzzy, but they should be inquired into with the jury
 12 here in a few moments.

13 And then the last item was a concern by the defense
 14 that some of the state's exhibits that have not been admitted
 15 yet have been left in such open view that some of our jurors
 16 entering the court may have been able to observe them.

17 Have I articulated those concerns?

18 I think Mr. Chapman brought those two concerns up?

19 MR. CHAPMAN: Yes, sir.

20 THE COURT: Do we have anything else? I want to take
 21 these issues up with the jury before we get under way. Do we
 22 have anything else we need to address before we get under way,
 23 Mr. Verharen?

24 MR. VERHAREN: No, Judge.

25 THE COURT: Miss Taylor?

1 MS. TAYLOR: No, Your Honor.
 2 THE COURT: Why don't we bring Ms. Broughton in and we'll
 3 visit with her for a moment.
 4 (Juror Ms. Broughton entered the courtroom).
 5 THE COURT: Good morning, Miss Broughton.
 6 MS. BROUGHTON: Good morning.
 7 THE COURT: How are you this morning?
 8 MS. BROUGHTON: I'm doing well, thank you.
 9 THE COURT: Ms. Broughton, we received a little
 10 information from our bailiff that you have some concerns about
 11 being able to proceed as a juror now in this case. Apparently
 12 this came up last night in a phone conversation; is that
 13 correct?
 14 MS. BROUGHTON: Correct.
 15 THE COURT: Can you let us know?
 16 MS. BROUGHTON: Yes. I have seven children. When I got
 17 home last night they were a little overwhelmed with
 18 everything. We did talk and they did state to me that they
 19 felt that they could continue throughout this trial. If it
 20 would not be a hardship on the court, I would like to be
 21 excused. If it is a hardship, then they said don't worry
 22 about it, mom.
 23 THE COURT: I appreciate you attending to the problem in
 24 that fashion. Sounds like you, having seven kids, you have
 25 some experience being a good mom. It is a hardship right

1 items I wanted to visit with our jury about here this
 2 morning. They may or may not be a significant issue, but I
 3 need to question you to see if they might be.
 4 First of all, it's very important in the course of a
 5 trial, and I think we have go over this, that you only
 6 consider evidence that's properly admitted in a case. I
 7 believe the lawyers were putting together some of their
 8 exhibits, potential exhibits, I should say, here in the
 9 courtroom, as some of were you entering or exiting either last
 10 night or this morning. I don't know that I have done this
 11 yet, but I certainly will admonish both counsel to be very
 12 careful with their exhibits that have not been admitted so
 13 that there is not any inadvertent exposure to our jurors.
 14 If for some reason you came in or out of the
 15 courtroom and saw items that you might feel were part of this
 16 case, they're not part of the case until they have been
 17 lawfully admitted, so I just simply wanted to remind you folks
 18 of that. We don't know if anything of that nature has
 19 occurred, we're just being a little extra cautious and taking
 20 this opportunity to remind you that unless an item is admitted
 21 in evidence by the court, it's not there for your
 22 consideration. So that's the first item that I wanted to
 23 address.
 24 The second item was it was also brought to our
 25 attention, and the details I'll confess are a little fuzzy so

1 now. I visited with counsel about it. We are not in a
 2 position to make a determination right now. What I would ask
 3 you to do is proceed forward for the time being. It would be
 4 a little bit of a concern for the court to try to only proceed
 5 with 13 jurors over the course of what could be two, maybe a
 6 little bit more, two weeks and then a few more days if that's
 7 what it's going to take.
 8 And as you can surmise, that would create real some
 9 real difficulties for the court. If things are progressing
 10 fine, we might be able to revisit this issue if you have some
 11 other problems. But for now I'd simply ask that you work with
 12 it as best you can. If there are some things that come up
 13 that we can do to try to accommodate that, we will see if we
 14 can't do that. I appreciate and have some concerns for that.
 15 Looks like we will go ahead and proceed with your assistance.
 16 Thank you very much, Ms. Broughton.
 17 If they're all comfortable, you can bring them all
 18 in.
 19 BAILIFF MR. FLOCK: Yes, sir.
 20 (Concludes without the jury present)
 21 (JURY PRESENT)
 22 THE COURT: Good morning, ladies and gentlemen of the
 23 jury. I think we are ready to get under way. As usual we
 24 always have a few matters we have to discuss and take care of
 25 before we can actually get under way. There's a couple of

1 I'm not sure if it's a significant issue, it could be,
 2 however. And that is that during our jury selection yesterday
 3 when we were back in chambers selecting the 14 of you, we had
 4 some information that one of our jurors who is not here
 5 anymore, potential juror, I should say, had been speaking out
 6 loud and making some comments that may have passed on his
 7 opinion about the guilt or innocence of the accused in this
 8 case.
 9 I don't know if such a thing occurred, I don't know
 10 if any of you were privy to such a conversation. But if you
 11 were, if you heard anything of this nature from another juror,
 12 I'd appreciate that you let us know now, and then if you heard
 13 something that you feel might have an impact on your ability
 14 to serve as a juror, I'd appreciate it if you would bring that
 15 to my attention. If I don't see any hands raising, I'll
 16 assume nobody heard anything that would have significantly
 17 impacted their ability to continue to serve as you all told us
 18 yesterday. I don't see any hands, so I appreciate your
 19 patience.
 20 Otherwise I think we are ready to get under way.
 21 Mr. Verharen, are you ready to make your opening
 22 statements to the jury?
 23 MR. VERHAREN: Yes, sir.
 24 THE COURT: There was one other item that I know we ruled
 25 on this earlier, I have entered an order excluding all fact

1 witnesses other than those that are actually testifying. I
2 just want to make sure counsel monitors that, because I can't
3 recognize who the witnesses are and who they aren't. Make
4 sure that you attend to that. That exclusion would certainly
5 apply to any opening statements that are made by counsel.

6 If counsel has a witness here that they recognize,
7 they need to attend to that directive. I made sure that our
8 monitor out in the hallway that the camera folks are using has
9 absolutely no audio whatsoever, so that should not be a
10 problem as far as any witnesses having that availability to
11 any testimony ongoing in the courtroom.

12 And just to remind our jurors once more, I know we
13 have a camera in the courtroom, but they're under an absolute
14 prohibition to take any photographs of any members of the
15 jury, so I just wanted to remind you of that.

16 With that you can commence your opening statement.

17 MR. VERHAREN: Thank you, Judge.

18 On January 1st of this year Mr. Ellington used his
19 vehicle, a 4-wheel drive, full-size Chevy Blazer to
20 essentially commit three different violent acts upon three
21 different women. He first used that vehicle upon two
22 sisters. He rammed their vehicle with his. He pushed it over
23 45 feet across the pavement until it was stuck in the dirt on
24 the side of the road, and in doing so destroyed the vehicle.

25 He then turned the vehicle immediately upon the two

1 daughters' mother who was running across the road to the aid
2 of her daughters, having just seen what had happened, and he
3 turned that vehicle upon their mother, struck her and killed
4 her.

5 The reason that he committed these acts is simply
6 because he was angry. Earlier in the day on January 1, 2006,
7 at some point he got into an argument with his girlfriend Ann
8 Thomas. Mr. Ellington was staying at the time in a trailer
9 off Brunner Road on some property belonging to Jake and Janice
10 Bronson. He and Mr. Bronson were old friends. And in that
11 trailer he was staying with his girlfriend and his
12 girlfriend's small child. Early that morning he got into an
13 argument and he left. He left to go down to his friend Ron
14 Cunningham's house. Ron Cunningham lives about five minutes
15 away from where Mr. Ellington was staying, he lives on
16 Scarcello Road, it's about four miles away.

17 When he left that morning after the argument with
18 his girlfriend he took his Chevy Blazer. This is a
19 mid-seventies model Blazer. It's got, like I said, 4-wheel
20 drive, it has a V-8 engine. And the Blazer didn't have any
21 license plates on it, it had no license plates on the back, no
22 license plates on the front. So he took that down to his
23 friend Ron Cunningham's house. He got there around 6:30 or 7
24 in the morning. Ron Cunningham lives on some property with
25 ex-wife Carol Cunningham who lives in another trailer on the

1 property. He got down to Mr. Cunningham's trailer early in
2 the morning and they started drinking beer and watching TV.

3 At some point around nine o'clock in the morning
4 Mr. Ellington went out and got some more beer or Zima is what
5 he was drinking, at a local store, came back and again sat
6 with Mr. Cunningham watching TV and drinking.

7 Around 11 o'clock or so in the morning Mr. Ellington
8 decided to go back home to where he and his girlfriend were
9 staying in this trailer. And on the way back home he got
10 behind a white Honda accord, 1996 Honda Accord, and apparently
11 thought that the Accord was traveling too slow. So he
12 abruptly passed the vehicle and got around to the front of the
13 vehicle and then stopped. He stopped at the intersection of
14 Ramsey and Brunner. This is all up in Athol.

15 He got out of his vehicle and he walked back to the
16 occupants of the Honda Accord. He swore at the occupants, he
17 challenged them, told them to come out and fight him, and then
18 he punched the window on the driver's side of the Honda just
19 where the driver's head would be if the window hadn't been
20 there.

21 Inside the Honda were two sisters, Jovon Larsen, she
22 was the driver, that was her car, and Joleen Larsen, she was
23 in the passenger seat. Jovon Larsen is a 22 year old, excuse
24 me, 21 year old single mother, she lives on her own, she has a
25 four year old boy named Zac, she lives in Hayden and her

1 sister is Joleen Larsen. She had turned 18 just a couple days
2 before. At the time she was a high school student up in
3 Rathdrum, and she had spent the night at her sister's house,
4 Jovon's house, New Year's Eve night. Jovon had taken her son
5 up to her grandparents' house and that's where he spent the
6 night, but the two sisters spent the night together at Jovon's
7 apartment.

8 So that morning Jovon was taking her sister back to
9 her parents' house and was also going to pick up her son
10 there. On the way they had picked up a Sunday paper and a
11 doughnut for the little boy and were headed up there. They
12 were going to their parents' house who are Joel and Vonette
13 Larsen. Joel is a truck driver, he works for a company called
14 Baker Commodities in Spokane. Vonette was a hairdresser.
15 Besides the two sisters Jovon and Joleen, Joel and Vonette
16 have another girl and her name is Jamie, she is 14, she wasn't
17 there during this.

18 At any rate the two sisters didn't get out of the
19 car despite what Mr. Ellington was telling them to do, instead
20 they locked the doors of the Honda as he approached. Joleen
21 got on the phone with 911 as he was leaving after he had
22 punched the window. As Mr. Ellington was leaving to get back
23 to his trailer off Brunner, had to take a right turn there at
24 the intersection of Ramsey and Brunner, and the two women, not
25 being able to give a license description to the 911 operator,

1 decided to follow Mr. Ellington. As Mr. Ellington got close
2 to the area of his driveway off Brunner Road, apparently
3 realized that he couldn't drive up his driveway or else the
4 girls, the two women, would be able to tell the police where
5 he went.

6 So he stopped his vehicle again in the road, put it
7 in reverse and backed up rapidly to where the girls were
8 behind him and stopped his vehicle just before he hit them.
9 He then took off down Brunner Road and went to Seasons Road,
10 which is your next left, went northbound on Seasons Road and
11 then went right, which would be eastbound -- excuse me, up
12 Weir and then to Seasons, and the girls on 911 followed him.

13 Up on Seasons Road he decided to double back to
14 where he wanted to go, which was his trailer there off Brunner
15 Road. And so as the two women were following he did a U-turn
16 in Seasons Road and came around in the two women's lane rather
17 than going back to his proper lane as he was going the other
18 way, he went into their lane and he drove straight at them.
19 And he drove straight at them until just before hitting them
20 and then turned back into his own lane. This happened while
21 the two women were on the phone with 911. And he continued
22 back down Seasons and then to Weir, just retraced the route he
23 had just taken.

24 That action, him doing that and threatening the
25 girls there that second time, the first time being when he

1 punched the window, gave him enough of a lead so he was able
2 to get down to Brunner and get up his driveway to his trailer
3 without the two women being able to see where he went, they
4 lost sight of him.

5 The two women, Jovon and Joleen, went to the corner
6 of Ramsey and Brunner, the same place where this happened, and
7 waited for the sheriff's department to get there after talking
8 to the 911 operator. They hung up the phone with 911 and they
9 called their parents to tell them why they were going to be
10 late. Joel and Vonette were home. They left Zac, their four
11 year old grandson, with Jamie, the 14 year old girl, and they
12 decided to go to where the girls were to see if they could
13 help them.

14 They took their Subaru, which is an older model
15 Subaru, it's a maroon color, 4-door Subaru. Vonette drove.
16 Joel Larsen had had surgery several weeks before, he had torn
17 a bicep and had to have it surgically reattached, and so his
18 left arm was in a sling. Although he could drive, it was
19 easier for Vonette to drive that vehicle, so she drove the
20 Subaru. Underneath the passenger seat of the Subaru was a
21 pistol. The pistol had been in the car for at least a couple
22 days, he had taken it out in the woods a day or two before
23 when he was out horn hunting.

24 Joel and Vonette get to where their two daughters
25 are, they are just about five to ten minutes away, they also

1 live in Athol. They talk to their daughters and they indicate
2 where they think this Blazer has gone, which is a portion of
3 the road on Brunner. That's where the two women thought
4 possibly the Blazer had gone, and so that's where Joel and
5 Vonette go. They were going to drive down that area and look
6 at the driveways and see if they can see the Blazer and then
7 they can tell law enforcement where the Blazer is. So they go
8 and do that.

9 Meanwhile they're down at Brunner Road. Deputy
10 Klinkefus with the sheriff's department gets to where the two
11 women are parked on the side of the road. He asked them about
12 what happened, they give him a quick run-down of what took
13 place. He gives them a couple witness statement to fill out
14 and he decides to go look for the Blazer. He tells them he
15 will be back in a little while. He goes in the other
16 direction looking for the Blazer.

17 Back down on the other end of Brunner Road where the
18 parents of Jovon and Joleen are, Joel talked to a couple of
19 people on the side of the road and then decided to walk up a
20 driveway where he thought the adjacent property might have
21 this Blazer because of the way it looked and things like that
22 on the property. So he was going to go up the driveway and
23 ask permission from that property holder to go up and look
24 along the fence line and see if he could see the Blazer. And
25 so that's what he did.

1 While these things are happening Mr. Ellington had
2 gotten back to his trailer and essentially he immediately got
3 in another argument with his girlfriend Ann Thomas. He
4 described to her what had just happened with these two women.
5 He said that they were playing cat and mouse with him. And
6 that he got out of his vehicle and pounded on their window and
7 he was screaming at them about the way they were driving. And
8 as he's relaying this information to Ann Thomas, he's growing
9 more and more angry.

10 At some point, to let him cool off, Ann Thomas
11 leaves the trailer and she goes over to the Bronson house
12 to let Mr. Ellington cool off. Rather than do that,
13 Mr. Ellington gets back in his Blazer, drives down the
14 driveway and gets back on Brunner, and he's going back to Mr.
15 Cunningham's house where he had just been within hour before.
16 It's at that place then when he gets on Brunner that Joel and
17 Vonette see him driving down Brunner. He goes down Brunner
18 and then hangs a left, which would be south on Ramsey, and
19 that's where the two women are parked filling out their
20 witness statement forms.

21 As he drives by them he flips them off and continues
22 down Ramsey. The two women get back on the phone with 911.
23 They turn around and start following Mr. Ellington. They're
24 doing so in order to let the sheriff's department know where
25 this vehicle is. They assume that Deputy Klinkefus is very

1 close. Behind the two women's vehicle comes their parents,
2 Vonette and Joel don't have a cell phone, they don't have any
3 way to talk to their two daughters, they can't tell them to
4 stop or do anything, all they can do is follow their two
5 daughters behind this Blazer.

6 And so all three cars proceed down Ramsey Road, and
7 it gets to a high rate of speed. The two women estimate in
8 their vehicle they're going about 80 miles an hour down Ramsey
9 Road. They figure that the Blazer is going about 100 because
10 it's pulling away from them. They get down to the corner of
11 Ramsey and Scarcello Road and the Blazer takes a right and
12 heads west. Scarcello Road is the same place where the
13 driveway of Mr. Cunningham is, and the parents of the two
14 women following the two women.

15 Mr. Ellington can't go up the driveway to the
16 Cunningham residence because the two women are following him,
17 and so much like the actions that he took up on Brunner when
18 he couldn't go up his driveway because the police would be
19 able to find him, he went past the Cunningham driveway. He
20 went something less than a mile past the driveway, and then
21 decided to double back just like he had done up on Seasons and
22 had been successful. And so he skid to a stop on Scarcello
23 Road at a Y, where a road comes out on Scarcella Road, he skid
24 to a stop there. And the two women in the Honda, seeing him
25 do this, parked in their lane.

1 The parents of the two daughters came around their
2 two daughters in their car in their Subaru and they parked in
3 front of the Honda in order to try and get in front of their
4 daughters. And as Mr. Ellington is backing up and proceeding
5 to go the other direction, which would be eastbound on
6 Scarcello back to the Cunningham driveway.

7 As Joel and Vonette are rolling to a stop in their
8 Subaru in the wrong lane, in the eastbound lane of Scarcello
9 in front of their daughters' vehicle, Mr. Ellington comes
10 around. And he hits the left corner of their Subaru with his
11 right door, puts a dent in his door and causes a little bit of
12 damage to the left front of the Subaru.

13 He comes around and then he has a couple of
14 choices. At this point Mr. Ellington can go straight down
15 Scarcello Road in the eastbound lane and go to the Cunningham
16 driveway. That's the choice that's available to him at that
17 time. But the choice that he makes is to carry out the treats
18 that he had earlier made upon these two women, he had punched
19 their window, he had backed up to them and he had drove in
20 their lane towards them. This time he doesn't back off and he
21 doesn't drive away, this time he carries out his threat.

22 And as he comes around the corner of the parents'
23 car, rather than driving away he proceeds across the eastbound
24 lane of Scarcello Road, across the road, and guns it and
25 collides with the two women's car in the front part of their

1 car. He does it at full acceleration. As he's impacting the
2 car and pushing the car across the road, he's got this vehicle
3 in four-wheel drive. He tears off the bumper of the Honda, he
4 crumbles the hood up, air bags deploy inside the Honda, he
5 totals the vehicle as he's doing this, and he continues to
6 push this vehicle over 45 feet across the road sideways until
7 the passenger side wheels of the Honda are furrowed in the
8 dirt and he just can't push it any more.

9 Joel and Vonette are still in the Subaru. Joel is
10 in the passenger seat, Vonette in the driver's seat, and they
11 watch, as this happens they watch the Blazer come around and
12 they watched him turn around rather than leaving in the
13 eastbound lane, they watch him drive straight for their
14 daughters. And they both turn around and look out the back
15 window of the Subaru and watch him do this to their daughter's
16 car.

17 Vonette is screaming, she's hysterical of what she's
18 seeing. Joel is in fear for his daughters' lives. He knows
19 that he has to somehow try to stop Mr. Ellington. He gets the
20 pistol out of the car underneath the passenger seat and he
21 gets out. He goes to the -- trying to make it to the driver's
22 side of the Blazer to stop Mr. Ellington.

23 Vonette goes kind of the other way, she goes across
24 the road running to her daughters. She is going to try and
25 get to her daughters. Her daughters are trying to bail out of

1 the vehicle, and Joleen screams jumps out as the vehicle is
2 still slightly moving on the passenger side in this ditch, and
3 shortly thereafter so does Jovon.

4 Joel doesn't make it to the driver's side of the
5 Blazer. The Blazer, after it gets done pushing the Honda,
6 starts to back up and that's where he is. He has the gun in
7 his right, and as it's backing up it hits his right hand and
8 then it starts to go forward. And Joel goes forward with it.
9 And as he's going forward and sees the Blazer going forward,
10 at the precise moment he starts forward he can see, as he's
11 going along the passenger side of the Blazer, he can see a
12 hand on the steering column of this Blazer, put it into drive,
13 and then he can hear the Blazer's acceleration just basically
14 get punched. And as he gets up to the passenger side of the
15 vehicle, of this Blazer, he can see the driver of the vehicle,
16 he can see a full profile of him, it's Mr. Ellington.

17 He can also see on the other side of Mr. Ellington
18 is the Honda, his daughters, Jovon's car, and he knows that if
19 he shoots in that direction towards the direction of Mr.
20 Ellington that he risks hitting his daughters on the other
21 side of the window. And he can only see his wife out in front
22 of the Blazer trying to get to his daughters crossing the
23 road. So knowing that he has to somehow stop Mr. Ellington
24 from either hurting his daughters again or running over his
25 wife he does the one thing he can think of, and that is to

1 shoot at the engine of the motor, which is at the passenger
2 side quarter panel up by the engine, and so does it, he shoots
3 right there.

4 Mr. Ellington is still looking forward toward his
5 wife who is down the road there a little ways and it doesn't
6 work. The Blazer keeps going, it's at maximum acceleration.
7 He's got this thing punched, Mr. Ellington does, and again
8 Mr. Ellington has a choice. He can just go straight ahead
9 at this point and get into the eastbound lane, which would be
10 the correct lane of travel for him, and go back to the
11 Cunningham driveway where he was headed. That would be the
12 easiest thing for him to do and it would be the natural path
13 of the vehicle for him to get into the correct lane, but the
14 choice he makes is similar to the choice he made when he
15 rammed the two women's car.

16 And instead what he does is he makes a hard left
17 turn and he turns into the wrong lane, which is the westbound
18 lane, and so he makes this hard left turn into the wrong lane
19 and that's where Mrs. Larsen is as she's trying to get to her
20 daughters. As Mrs. Larsen almost to where her daughters are,
21 she apparently realizes that she's not going to make it and
22 she stops and tries to back pedal. And it's at that moment
23 that Mr. Ellington strikes her.

24 He struck her basically in the center of the Blazer,
25 her head hit onto the hood of the Blazer, and she went under

1 the Blazer. The Blazer bounced up and down over her, still
2 at full acceleration, and continued on past her after
3 Mr. Ellington ran her over. And as soon as he got done
4 running over Mrs. Larsen he got back into the correct lane of
5 travel.

6 And as soon as he got done running over Mrs. Larsen,
7 Joel Larsen emptied the gun at him, he fired the remaining
8 rounds. One round did connect with the Blazer, it hit the
9 passenger side back window, it deflected off, it spun off the
10 window.

11 Mr. Ellington continued on down, after he got back
12 into the correct lane of travel, continuing on down Scarcello
13 Road until he got to the driveway of the Cunningham residence.
14 And this time rather than parking where people normally park
15 at the Cunningham residence, he parks behind their pump shed
16 so only the back end of his Blazer is visible from Scarcello
17 Road. He goes back inside the trailer with Mr. Cunningham and
18 they get to drinking again and watching TV, and Mr. Ellington
19 doesn't say anything to Ron Cunningham about what happened.

20 A little while after that Carol Cunningham comes
21 home, and she noticed as she was coming off Scarcello all
22 these police officers, road blocked off, and she goes into the
23 trailer where Ron Cunningham is and where Mr. Ellington is
24 drinking beer and watching TV, and she says there is a big
25 accident down here on Scarcello, either of you know what

1 happened? And there's no response from Mr. Ellington.

2 It's something over an hour after he gets to Mr.
3 Cunningham's residence that a passing ISP trooper notices the
4 back end of a Blazer behind this pump shed, goes up to the
5 Cunningham place and they make contact with Mr. Ellington and
6 he's arrested.

7 Back at the scene back on Scarcello Road the two
8 girls are hysterical, just saw their mother die. Mr. Larsen
9 is very upset having just seen the same thing happen. And
10 within a few minutes after this happening Deputy Klinkefus
11 arrives, the same deputy that contacted the girls up on the
12 corner of Ramsey and Brunner, and tries to get a handle on the
13 situation. He's got two hysterical sisters and a very upset
14 father and a person who is in the roadway here. He goes to
15 Mrs. Larsen.

16 An off-duty jailer by the name of Deputy Gregg just
17 happens to be there also goes to help Mrs. Larsen, but they
18 can't do anything for her. She has an open skull fracture,
19 her skull was crushed and they could see that. They can't do
20 CPR because her jaw is broken and they can't find an airway,
21 and they wait for medical to get there. Medical does come and
22 pronounced her dead, and an investigation begins.

23 The two women and their father Joel Larsen are taken
24 to the Rathdrum Police department, they're given separate
25 interviews. The troopers begin reconstruction of the scene.

1 The investigation is handled by Sergeant Maskell here.

2 Based on the investigation in this case, as well as
3 the statements that you're going to hear up on the witness
4 stand, you're going to find that Mr. Ellington did commit
5 these crimes, that he did intentionally batter these women
6 with that vehicle, and he did intentionally kill their
7 mother.

8 Thank you.

9 THE COURT: Thank you, Mr. Verharen.

10 Miss Taylor, is it your desire to make an opening
11 statement at this point or reserve that until later on?

12 MS. TAYLOR: Your Honor, I would like to do it now, thank
13 you.

14 THE COURT: All right, go ahead, please.

15 MS. TAYLOR: Good morning, ladies and gentlemen. The
16 state would have you believe that Mr. Ellington, completely
17 unprovoked, got out of his truck and went back to contact
18 Jovon and Joleen Larsen. That unprovoked that that made him
19 angry. Something happened out there on Scarcello Road before
20 he got out of his truck.

21 Early that day on January 1st of this year John
22 Ellington went to see his friend Ron Cunningham. He went to
23 see Ron Cunningham on Scarcello Road so they could watch some
24 football games. You will hear from Ann Thomas to tell you
25 about the disagreement they had which had to do with her

1 health. She had recently had a diagnosis and it was a
2 critical issue, and Mr. Ellington was concerned because she
3 wasn't taking as good of care of herself as he thought she
4 should. It wasn't a huge fight, a little frustration.
5 Mr. Ellington went to his friend Ronnie and hang out with him
6 and watch a football game or two.

7 That day he went to TLV, Twin Lakes Village, a store
8 out there, and he bought one Zima. Johnny Longest will tell
9 you that Mr. Ellington was in a good mood, he was happy, he
10 was joking. He bought one Zima at that store that morning.
11 Mr. Ellington then went back to Ronnie's house, and that was a
12 little while longer and then decided to go back home.

13 On his trip home he encountered the Honda.
14 Something happened out there. Ann Thomas will tell you what
15 he said. That white Honda was playing cat and mouse with him.
16 He went to pass and they pulled over, and he couldn't get his
17 car around so he had to back off and get back in. And then
18 they slowed down. He finally was able to pass, maybe it was a
19 little irritating, got out his car to see who it was. Was it
20 somebody he knew? He didn't know. Turned out it wasn't, it
21 was two girls. Hit their window and got back in his car and
22 it's over, end of story.

23 He turned onto Brunner Road to go home where he's
24 staying, but that white Honda gets right in behind him. He
25 stops near the driveway of the Bronson property so that he

1 could go in, that white Honda is right there. He put the
2 Blazer in reverse, backed up, and then put it back forward and
3 the white Honda just kept coming. He turned onto Weir Road.

4 Now, Weir is a gravel and dirt kind of road, and he
5 turned onto that road to travel a ways. As he picked up
6 speed, so did that white Honda. Almost a mile up Weir Road
7 that that Honda was right in behind him. When he got up to
8 Seasons Road he was able to turn around, get on Seasons Road
9 and turn around a bit. The white Honda did the same thing.

10 As he gained speed on Weir Road, the white Honda was
11 still right in there behind him. Finally at Brunner he was
12 able to get some distance and get away, and he went home, he
13 went to his home on Brunner Road. And that's where he stayed
14 for over 30 minutes. Over 30 minutes he was at his home.
15 Meanwhile during that 30 minutes the police had been called,
16 Joleen Larsen was on with 911 during this chase, and Deputy
17 Klinkefus responded from the sheriff's department.

18 Also they called their parents, and their parents
19 responded to the area, too. The parents got there first and
20 Joel Larsen was looking for this Blazer. There's about six
21 driveways on Brunner Road and he was going up and down
22 driveways looking for this Blazer.

23 There were some people on the roadside that Joel
24 Larsen stopped to talk to, Susie Cooley and Mike Denny. Susie
25 and Mike were engaged at the time, they're now married. Susie

1 will tell you that she had a little conversation with Joel
2 Larsen. He appeared angry and agitated as if he was looking
3 for someone and she was frightened of him.

4 Meanwhile Deputy Klinkefus finally arrives at Ramsey
5 and Brunner and speaks with the girls. He gives them a
6 statement to fill out and tells them that he'll go and look
7 for the Blazer, kind of determine where it wouldn't be and go
8 to look for where it might be. He also tells them if they see
9 the Blazer, call 911. He did not tell them to chase the
10 Blazer again.

11 Some 30 minutes past and the Blazer emerges.
12 Mr. Ellington is going back to Ronnie's house. He leaves
13 that driveway on Brunner, and the red Subaru, maroon Subaru
14 turns around and gets in behind him. As he makes the corner
15 at Ramsey and Brunner the people in the white Honda are facing
16 north so they have to turn around. The red Subaru waits at
17 that corner for the Honda to turn around and get in behind the
18 Blazer.

19 As the Blazer travels on Ramsey Road, the Honda and
20 the Subaru are right in behind him, two and-a-half to three
21 miles along Ramsey Road. S-curve after S-curve after S-curve,
22 the Blazer is trying to get away from these people and they
23 are just in behind him, they're not going to give up that
24 chase.

25 Finally at Scarcello Road Mr. Ellington turns his

1 Blazer, the Honda turns and the Subaru turns. Joleen Larsen
2 an was on the phone with 911 during this sequence of the
3 chase. She is instructed that the officer wants them to pull
4 over and not follow. They want to keep the chase up. They
5 travel 1.2 miles along Scarcello Road to get to the place
6 where this accident took place. 1.2 miles longer the Honda
7 and the Subaru are right in behind that Blazer.

8 When we get to Scarcello Road, Scarcello Road has a
9 slight incline and an S-curve, and then when you get up the
10 incline there is a driveway on the north side of Scarcello
11 Road and a driveway on the south side of Scarcello Road. In
12 between those two driveways is where this incident took
13 place. Mr. Ellington got to the driveway on the south side of
14 the road, the further one along Scarcello Road first, and when
15 Joleen and Jovon Larsen got up at the incline, they saw his
16 Blazer in the snowbank.

17 He then had to reverse on Scarcello Road and get in
18 the lane so that he could leave, so that he could go back the
19 way that he had just come to try to get away. At the time
20 that happened the Honda is in one lane, the correct lane of
21 travel, and the Subaru comes out and gets in the other lane
22 blocking Mr. Ellington's escape route. Both lanes were
23 occupied at this time.

24 As Mr. Ellington tries to use the edge of the
25 driveway on the side of the road to leave, the Subaru angles

1 in and the Subaru is moving slightly as Mr. Ellington is
2 trying to come around. As he comes around the Subaru, the
3 Subaru pulls forward and there is a collision between the two.
4 The collision impacted the driver's side right area of the
5 Subaru and the door of the Blazer.

6 You will hear testimony from Skelton Engineering
7 group who used Idaho State Police investigative information,
8 the measurements that were taken, to reconstruct this
9 accident. They will tell you that the impact between the
10 Blazer and the Subaru rotated the Blazer into the Honda. The
11 Honda, as the Subaru had pulled up into the Blazer where the
12 door was struck, the Honda had also angled across the roadway
13 partially blocking the escape route and partially blocking the
14 correct lane. The impact between the Subaru and the Blazer
15 rotated that Blazer right into the Honda. Mr. Ellington had
16 been accelerating, he was trying to get out of there.

17 Skeltons will tell you about perception and reaction
18 time. There is a time to see something and be able to make
19 your body react to it. Mr. Ellington had no time when that
20 Subaru threw that Blazer into the Honda to perceive the
21 Honda's presence and to hit his brakes and react to it. So
22 the two vehicles engaged. Now, a Honda sits lower to the
23 ground and the nose is kind of angled downward and the Blazer
24 sits a little bit higher. So when they engaged, they kind of
25 got hung up on each other. The vehicles traveled together

1 with the Subaru, be forced over into the Honda, travel across
2 Scarcello Road, have to reverse to get away from the Honda, be
3 shot at at least one time, scrape the Honda and try to leave
4 when Mrs. Larsen was struck. 20 to 25 seconds. No time to
5 perceive and react.

6 Mr. Ellington was already in the wrong lane of
7 travel when he tried to leave. His Blazer was over to the
8 side, the westbound, so he had to cross the westbound lane, he
9 had to cross that lane to get to the eastbound lane anyway.
10 He simply did not have time to see Mrs. Larsen and react to
11 her presence while he was trying to get away from the gunshot
12 being fired at him.

13 By the end of this case, by the end of this trial,
14 by the conclusion of all of the evidence you will know that
15 Mr. Ellington spent a great deal of time trying to get away
16 from the white Honda first. He spent 30 minutes at his home,
17 30 plus minutes at his home, and then he spent some time
18 trying to get away from both the Honda and the Subaru. You
19 will know that when he got to Scarcello Road that he was
20 trying to get away and he was being blocked in, he was being
21 prevented from leaving, and Deputy Klinkefus was just a couple
22 of minutes behind.

23 You will know that Mr. Ellington did not hit that
24 Honda on purpose. He did not intend to have that collision
25 with the Honda. You will know that was the result of the

1 across Scarcello Road slowing down during this time.

2 Mr. Ellington had to put the brakes on and put his
3 car in reverse to get away from the Honda. The front of the
4 Blazer has a little hook on it and that got engaged with the
5 bumper of the Honda. So he had to reverse to get away from
6 the Honda. At some point during this at least one shot is
7 fired. One shot at least from a .44 caliber handgun at close
8 range. I believe Mr. Larsen will tell you that during this
9 reverse motion is when that shot was fired into the front
10 quarter panel of the passenger side into the compartment area
11 at close range.

12 Reacting to the sound of gunfire and knowing he's
13 being shot at, Mr. Ellington tried to get out of there. He
14 struck and scraped the side of the Honda with his front bumper
15 guard area as he's trying do get out of there.

16 Joleen Larsen will tell you that she saw her mom
17 heading towards the car and then she saw her reverse her
18 direction. Mr. Ellington did not have time to perceive
19 Mrs. Larsen's presence in the roadway, anticipate her change
20 of direction and react to it. He was trying to get out of
21 there. He was trying to leave. She stepped in front of him
22 and she was struck. This all happened very, very quickly,
23 20 to 25 seconds from the time the Blazer went into the
24 snowbank at Scarcello driveway area. 20 to 25 seconds to back
25 out of that snowbank, begin heading forward, have a collision

1 collision with the Subaru that forced that Blazer into the
2 Honda. And you will now that he did not see Mrs. Larsen, he
3 did he not hit her on purpose, he did not hit her
4 intentionally. You will know that the end result of what
5 happened on January 1st is a tragic, tragic thing, but you
6 will also know that Mr. Ellington is not guilty of the crimes
7 he's charged with.

8 THE COURT: Thank you, Miss Taylor.

9 With that are you ready to call your first witness,
10 Mr. Verharen?

11 MR. VERHAREN: Yes, sir.

12 THE COURT: Go right ahead.

13 MR. VERHAREN: Sergeant Carrington.

14 THE COURT: Good morning.

15 LISA CARRINGTON: Good morning.

16 THE COURT: If you will raise your right hand, the clerk
17 will administer the oath.

18 LISA CARRINGTON

19 was called as a witness on behalf of the
20 State, having been first duly sworn, was
21 examined and testified as follows:

22 THE COURT: Why don't you come forward and have a seat,
23 and as soon as you're comfortable, you can go ahead and
24 inquire, Mr. Verharen.

25 Members of the jury, just at the outset I want to

1 make sure that it's important that you hear all the testimony
2 from all the witnesses. If any of the witnesses at anytime
3 are difficult for you to hear, don't be shy, bring it to my
4 attention, we will have the witness either speak up or move
5 closer to the microphone or turn our sound up a little. It's
6 very important that you hear all the evidence.

7 So with that in mind, continue.

8 MR. VERHAREN: Thank you, Judge.

9 DIRECT EXAMINATION

10 BY MR. VERHAREN:

11 Q. Please state your full name and spell your last
12 name.

13 A. Lisa Lund Carrington. C-a-r-r-i-n-g-t-o-n.

14 Q. What do you do for a living?

15 A. I'm a patrol sergeant with the Kootenai County
16 Sheriff's department.

17 Q. How long have you been a police officer?

18 A. With Kootenai County for 17 years.

19 Q. Can you describe for us essentially the nature of
20 your duties?

21 A. I'm presently temporary assigned to the detective
22 division on light duty. I am a law enforcement officer on
23 patrol, and a shift supervisor normally.

24 Q. What's it mean to be a shift supervisor?

25 MR. CHAPMAN: Objection, relevance.

1 THE COURT: Overruled, you can answer the question.

2 A. I am responsible for the activities of the deputies
3 that are on shift at the time, similar to any other job where
4 you would have a supervisor watching over a group or
5 individuals doing a job.

6 Q. (By Mr. Verharen) As a shift supervisor are you in
7 an office or are you in a patrol car?

8 A. I'm in a patrol car, I'm in uniform and a working
9 unit.

10 Q. How are you in contact with the various deputies
11 that you're supervising?

12 A. Via radio and cell phone.

13 Q. Let me direct your attention to January 1, 2006. At
14 some point on that date did you start heading towards
15 Scarcello Road?

16 A. Yes.

17 Q. Can you tell us why, please?

18 A. My District 1 officer at the time had gone up on a
19 reckless driver road rage incident.

20 MR. CHAPMAN: Objection, personal knowledge.

21 THE COURT: Sustained, strike that response. I think it
22 was also unresponsive and lacks foundation. Continue.

23 Q. (By Mr. Verharen) Give us a general idea of why you
24 started heading up to Scarcello Road?

25 A. To help a deputy with a call he was on.

1 Q. At some point did you take some steps to seal the
2 area of Scarcello Road off?

3 A. Yes.

4 Q. Can you describe why you did that, please?

5 A. To establish a perimeter for an active area where a
6 suspect was at large.

7 Q. Describe for us how you went about doing that?

8 A. On the radio I had other units respond to the scene
9 at different locations.

10 Q. How many different deputies did you have under your
11 supervision that day?

12 A. Three.

13 Q. What did you assign those deputies to do
14 specifically?

15 A. The one District 1 deputy was already on the scene
16 of the incident.

17 Q. Who was that?

18 A. Deputy Klinkefus.

19 Q. Okay.

20 A. I had two other deputies available. One I sent to
21 Scarcello and Highway 41 to seal off that roadway, and I
22 proceeded to Scarcello Road and Ramsey Avenue until I could be
23 relieved by the other deputy coming from farther away.

24 Q. So at some point you do get to the area of Scarcello
25 Road?

1 A. Yes.

2 Q. What happens after that?

3 A. I was at the intersection of Scarcello and Ramsey, I
4 waited for Deputy McFarland to relief me at that point, and
5 then I went to the scene and contacted Deputy Klinkefus.

6 Q. So when you went to Deputy Klinkefus there at the
7 scene, what parts of that area did you have sealed off by
8 other police units?

9 A. My patrol car, when I came in, I sealed off the
10 westbound lane of travel on Scarcello, and I could see that
11 there was another car at the west end of the scene that was
12 blocking traffic at that time.

13 Q. What time do you think it was that you got the call
14 and started heading up there?

15 A. Approximately 12:40 in the afternoon.

16 MR. CHAPMAN: Objection, move to strike, your Honor,
17 approximately isn't precise.

18 THE COURT: I'll assume that's a term of art that the
19 witness is using, overruled, continue.

20 Q. (By Mr. Verharen) About 12:40 in the afternoon?

21 A. Yes.

22 Q. What time did you actually get to that area?

23 A. I got to Scarcello Road within moments, and I don't
24 know exactly what time that was. I was relieved by Deputy
25 McFarland at 12:51.

1 Q. You were relieved by Deputy McFarland at someplace
2 other than the scene?
3 A. Yes, at the east end of the perimeter which was
4 Scarcello and Ramsey Road.
5 Q. And then you went to where Deputy Klinkefus was at
6 the actual scene itself?
7 A. Correct.
8 Q. What time do you think you got that?
9 A. Three or four minutes after, I'd say 12:55.
10 Q. Describe for us, if you can, what the actual scene
11 looked like, just generally first of all?
12 A. There was an ambulance in the eastbound lane of
13 travel. There was a body laying perpendicular to the roadway
14 in the westbound lane of travel. There was a white passenger
15 car that was partially in the roadway, partially in the ditch.
16 And further west of that was a red passenger car headed
17 westwardly in the eastbound lane of travel.
18 Q. You talked about an ambulance, were there other
19 people around that area?
20 A. There was the ambulance personnel.
21 Q. Who else in terms of law enforcement was there other
22 than yourself?
23 A. Deputy Klinkefus and then there was an off-duty
24 detention deputy there with his personal vehicle that had come
25 upon the scene to assist.

1 describe their emotional condition for us?
2 A. Very agitated, hysterical, shocky.
3 Q. Do you know whether any efforts were made to get the
4 three witnesses away from that area?
5 A. Yes.
6 Q. Can you tell us about that, please?
7 A. Lieutenant Mattos, my supervisor, had arrived, and
8 also Captain Wolfinger had arrived. ISP Trooper Shawn Lynn
9 had arrived and was on the west end of the scene. It was
10 determined by Lieutenant Mattos and the detectives that he was
11 in contact with to take them to Rathdrum PD and they were all
12 escorted, driven to Rathdrum Police department.
13 Q. For what purpose?
14 A. For interviews and to get them out of the weather
15 and someplace comfortable.
16 Q. Which brings me to my next question, what was the
17 weather like that day?
18 A. It was cold, it was cloudy, damp.
19 Q. When you were there on scene, was it raining?
20 A. No.
21 Q. What was the condition of the roadway?
22 A. Damp.
23 Q. And at some point did you start taking some
24 photographs?
25 A. Yes, I did.

1 Q. Do you know his name?
2 A. Deputy Dan Gregg.
3 Q. And that was it in terms of law enforcement at that
4 time?
5 A. Yes.
6 Q. What happened after that?
7 A. I asked Deputy Klinkefus how I could assist him with
8 the scene. And he asked me to -- he was in contact with the
9 male witness there, and I had two females that were
10 hysterical.
11 Q. What was the name of the male witness?
12 A. I believe his last name is Larsen, I don't know his
13 first name.
14 Q. How about the two female witnesses?
15 A. Both daughters of Mr. Larsen and Mrs. Larsen, who I
16 find out later was the deceased on the roadway.
17 Q. And you had an opportunity to observe Joel Larsen
18 there.
19 A. Yes.
20 MR. CHAPMAN: Objection, leading.
21 THE COURT: I'll allow it to stand, continue.
22 Q. (By Mr. Verharen) can you describe his apparent
23 emotional condition at the time for us?
24 A. He was in an agitated state.
25 Q. How about the two women, the two daughters, can you

1 Q. Can you tell us why you started taking some
2 photographs?
3 A. I was requested to do so by Detective Maskell as his
4 arrival at the scene was delayed. And the light at that time
5 of the year was waning fast.
6 Q. What kind of camera did you get and from who to take
7 these photographs?
8 A. I don't recall the brand name, it was a digital
9 camera, I got it from Trooper Robnett who had been called to
10 the scene to do a reconstruction.
11 Q. And so when you started taking these photographs,
12 what time do you think it was?
13 A. About 1:30, approximately.
14 Q. In the afternoon?
15 A. Yes.
16 Q. And about how long after you had gotten there did
17 you start taking photographs there?
18 A. About a half hour, half hour, 35 minutes.
19 Q. And you took photographs from various angles
20 depicting what you could see there at that time?
21 A. Yes.
22 Q. Let me show you those photographs, we'll go through
23 them. Maybe the easiest thing to do is do them three at a
24 time. So the first one I want to show you has been marked as
25 Plaintiff's exhibit 10, do you recognize Plaintiff's 10?

1 A. Yes.

2 Q. Can you just generally for us describe what that
3 photograph shows?

4 A. It shows the roadway of Scarcello Road looking
5 westward with Mrs. Larsen in the center, a white passenger
6 car.

7 MR. CHAPMAN: Judge, object, testifying to the contents
8 of the photograph before it's admitted is improper, I believe
9 counsel well knows that.

10 THE COURT: I don't know that -- I think she is simply
11 laying some foundation here. I'll let you continue, go ahead.

12 Q. (By Mr. Verharen) just Generally first describe
13 what that photograph shows?

14 A. White passenger on the north side of the roadway,
15 and farther down westward a maroon passenger door and some
16 roadway debris in the westbound lane.

17 Q. Turn your attention to number 11 for us.

18 MR. CHAPMAN: Judge, I object to doing this three at a
19 time, there's going to be a multiplicity of photographs. I'd
20 ask the court to determine their admissibility one at a time.

21 THE COURT: I don't know that there's any rule that
22 requires that. I think if counsel wants to handle it in this
23 fashion, I think we can work with that, continue.

24 A. This is again looking westward on Scarcello Road. I
25 was standing farther north on the roadway looking westward.

1 taken.

2 A. Yes, sir.

3 Q. Is that the closest you can come?

4 A. I did not have a time line on the camera, yes, sir.
5 And looking at the report, that was my estimation, about
6 1:30.

7 Q. Looking at a report?

8 A. Not only the written report but also the video.

9 Q. Did you write a report?

10 A. No.

11 Q. So you looked at someone else's report?

12 A. Yes.

13 Q. Ma'am, when you were talking with Mr. Verharen you
14 were talking about sealing off, setting a perimeter; is that
15 correct?

16 A. Yes.

17 Q. Do you know that this is the way the scene looked
18 before law enforcement arrived, from your own personal
19 knowledge?

20 A. No.

21 Q. You can't tell us if, let's say, the Subaru was
22 moved before this photograph was taken?

23 A. Not before law enforcement arrived, you're right.

24 Q. So, ma'am, I guess the best way to say it would be
25 that this is how it looked as you arrived, after you arrived

1 And a picture of the white passenger car in the northern part
2 of the roadway and ditch, and then the red passenger car
3 farther on down the road westward.

4 Q. Different angle?

5 A. Different angle, same area.

6 Q. Let's do number 12, what's that one show?

7 A. I was standing in the eastbound lane of Scarcello
8 looking northward towards the Honda and marks on the roadway.

9 Q. These three photographs, 10, 11 and 12, are they
10 accurate photographs of that area at that time?

11 A. Yes.

12 MR. VERHAREN: Move the admission of 10, 11 and 12.

13 THE COURT: Perhaps to avoid an objection from
14 Mr. Chapman, Mr. Verharen, you asked the witness a question if
15 that's how the photographs appeared at that particular time.
16 I'm not sure if you're asking at the time of the photographs
17 or the time she arrived on the scene.

18 MR. VERHAREN: At the time that she took the photographs,
19 which I think she said was around 1:30.

20 THE COURT: All right, thank you.

21 MR. CHAPMAN: May I inquire in aid, sir?

22 THE COURT: Yes.

23 VOIR DIRE EXAMINATION

24 BY MR. CHAPMAN:

25 Q. Ma'am, you told us what time these photographs were

1 and not -- you can't tell us how it looked when you first got
2 there, I mean, when it first happened?

3 A. When it first happened, no. It had not moved by the
4 time I had gotten there, from the time I had gotten there
5 until the time I took the pictures it had not moved.

6 Q. How do you know that?

7 A. I was there at the scene.

8 Q. All right, by the time you got there, I understand.

9 Do you know of your own personal knowledge if the scene was
10 kept absolutely secure before these photographs were taken?

11 Q. No. Before they were taken, the photographs?

12 Q. Yes, ma'am.

13 A. Oh, I'm sorry. From the time I got there.

14 Q. Do you know that from the time the incident happened
15 that the scene was kept absolutely secure before you took
16 these photographs?

17 A. I can't testify to that, no.

18 MR. CHAPMAN: Thank you. May I tender these to the
19 clerk, Your Honor, for counsel?

20 THE COURT: That would be fine. Do you have any
21 objection in light of those questions, Mr. Chapman?

22 MR. CHAPMAN: May I confer one moment?

23 THE COURT: Certainly.

24 (Defense counsel conferring)

25 MR. CHAPMAN: Judge, turns out that I will not object to

1 11 or 12, and I think we need a hearing outside the presence
 2 as to the last one.
 3 THE COURT: As to?
 4 MR. CHAPMAN: Number 13, sir. I believe it's 13.
 5 THE COURT: 11 and 12 will be admitted. Perhaps,
 6 Mr. Verharen, rather than discuss the admissibility of this
 7 exhibit, recognizing that you have a number of others, is
 8 there any problem with proceeding with some other exhibits
 9 before we discuss this?
 10 MR. VERHAREN: Judge, I think that is not 13, I think
 11 it's 10.
 12 MR. CHAPMAN: I think counsel is correct.
 13 MR. VERHAREN: No, I don't.
 14 THE COURT: We will reserve ruling on that until we have
 15 a chance to discuss it, and I'll let you continue.
 16 MR. VERHAREN: Thank you, Judge.
 17 DIRECT EXAMINATION (cont'd)
 18 BY MR. VERHAREN:
 19 Q. Let me show you three more, Sergeant, 13, 14
 20 and 15. We'll start with 13, what's that a photograph of?
 21 A. Scarcello Road from the driveway on the west end of
 22 the scene. It's looking on the northeast direction and
 23 centered is marks on the roadway and a debris field and the
 24 white car.
 25 Q. Let me show you 14, what's that a photograph of?

1 BY MR. VERHAREN:
 2 Q. Ma'am, let me show you three more, 16, 17 and 18,
 3 start with 16, what's that a photograph of?
 4 A. It was of Scarcello road and the front of the red
 5 car. I'm standing in the driveway looking northeast of the
 6 scene from the westward end.
 7 Q. How about 17, what's that a photograph of?
 8 A. The center of the scene looking from the front of
 9 the Subaru down the center of Scarcello Road looking
 10 eastward.
 11 Q. And the last one, number 18, what's that a
 12 photograph of?
 13 A. That's a closer picture of the white car looking
 14 eastward and the roadway and debris field.
 15 Q. These three photographs, 16, 17 and 18, are they
 16 accurate photographs of the area at the time that you took
 17 them?
 18 A. Yes.
 19 MR. VERHAREN: Move to admit 16, 17 and 18.
 20 VOIR DIRE EXAMINATION
 21 BY MR. CHAPMAN:
 22 Q. Same question, same answer, ma'am? That same
 23 question being when you say this is how it looked when you
 24 were there, you weren't there when it happened?
 25 A. Correct.

1 A. That's of Scarcello Road, I'm standing in the center
 2 of Scarcello Road looking southwest through the entrance of
 3 the driveway at marks on the road.
 4 Q. The last one I have here is 15, what's that a
 5 photograph of?
 6 A. That's from the west end of the scene looking
 7 eastward across Scarcello Road across the mouth of the
 8 driveway.
 9 Q. These three photographs 13, 14 and 15, are they
 10 accurate photographs of the area when you took them?
 11 A. Yes.
 12 MR. VERHAREN: Move to admit 13, 14 and 15.
 13 MR. CHAPMAN: Moment, please, sir?
 14 THE COURT: That would be fine.
 15 MR. CHAPMAN: Couple questions in aid, if I may?
 16 THE COURT: Please.
 17 VOIR DIRE EXAMINATION
 18 BY MR. CHAPMAN:
 19 Q. Ma'am, again you can not testify that this is the
 20 way the scene looked immediately after the incident happened?
 21 A. Correct.
 22 MR. CHAPMAN: Your Honor, since we've got that
 23 straightened out, we won't object to 13, 14 and 15.
 24 THE COURT: Thank you. 13, 14, 15 will be admitted.
 25 DIRECT EXAMINATION (cont'd)

1 MR. VERHAREN: Objection, asked and answered.
 2 THE COURT: It's a different exhibit. Same question, but
 3 a different exhibit.
 4 MR. CHAPMAN: Same question, same answer, has to be
 5 asked.
 6 Judge, we're not going to object with that
 7 clarification to 18. Your Honor, in the interest of moving
 8 this along, we do have objections to 17 and 16. Perhaps we
 9 could take that up an appropriate time.
 10 THE COURT: We'll admit 18 at this point, but again I'll
 11 reserve ruling on exhibits 17 and 16 and we will discuss that
 12 when we take a break, the jury takes a break.
 13 Continue, Mr. Verharen.
 14 DIRECT EXAMINATION (cont'd)
 15 BY MR. VERHAREN:
 16 Q. Sergeant, three more, 19, 20, 21. What's
 17 Plaintiff's 19 a photograph of?
 18 A. It's a close-up or closer angle of the white car
 19 from looking from west to east and marks in the dirt.
 20 Q. How about 20, what's that a photograph of?
 21 A. That's a very close-up of the white car and the
 22 proximity of the marks in the dirt.
 23 Q. And then the last one here, 21?
 24 A. That is looking from the Honda westward along the
 25 roadway the marks in the dirt.

1 Q. These three photographs, 19, 20, 21, they're
 2 accurate photographs of that particular area at the time you
 3 took them?
 4 A. Yes.
 5 MR. VERHAREN: Move to admit 19, 20 and 21.
 6 MR. CHAPMAN: When I say the same question, same answer,
 7 do you know what I mean, ma'am?
 8 WITNESS SERGEANT CARRINGTON: Yes, and yes.
 9 MR. CHAPMAN: With that caveat, Judge, no objection to
 10 21, 20 and 19.
 11 THE COURT: Thank you. 19, 20 and 21 then can be
 12 admitted.
 13 Q. (By Mr. Verharen) sergeant, I have 22, 23 and 24,
 14 what's 22 a photograph of?
 15 A. Of Scarcello Road west of the white car showing
 16 marks on the road, and Mrs. Larsen.
 17 Q. How about 23?
 18 A. From the eastbound lane on Scarcello Road behind the
 19 red car and looking towards the white car and the debris
 20 field.
 21 Q. And 24?
 22 A. From the center of the roadway on Scarcello looking
 23 directly at the white car.
 24 Q. These are accurate photographs of that area at the
 25 time you took them?

1 A. Yes.
 2 MR. VERHAREN: Move to admit 24, 23 and 22.
 3 MR. CHAPMAN: Same question, same answer?
 4 WITNESS SERGEANT CARRINGTON: Yes, sir.
 5 MR. CHAPMAN: With that caveat, Judge, no objection to
 6 24, 23 and 22.
 7 THE COURT: 22, 23 and 24 will be admitted, thank you,
 8 sir.
 9 Q. (By Mr. Verharen) Sergeant, 25, 26 and 27, what's
 10 25 a photograph of?
 11 A. Of the driver's side window of the white car and a
 12 smudge that I was attempting to get on film.
 13 Q. How about 26?
 14 A. Looking northeast from the eastbound lane of
 15 Scarcello to show where Mrs. Larsen was on the roadway.
 16 Q. And then 27?
 17 A. Another angle on the white car from the westbound
 18 lane of Scarcello Road.
 19 Q. Are these accurate photographs of the area at the
 20 time you took them?
 21 A. Yes.
 22 MR. VERHAREN: Move to admit 26, 25 and 27.
 23 MR. CHAPMAN: Same question, same answer, ma'am?
 24 WITNESS SERGEANT CARRINGTON: Yes, sir.
 25 MR. CHAPMAN: Your Honor, with that caveat we have no

1 objection to the admission of 25.
 2 THE COURT: 25 can be admitted.
 3 MR. CHAPMAN: As to 26 and 27, we will need to have that
 4 hearing, sir.
 5 THE COURT: We will discuss 26 and 27 at our convenience.
 6 Continue, Mr. Verharen.
 7 MR. VERHAREN: Thank you, Judge.
 8 Q. (By Mr. Verharen) Sergeant, what's photograph
 9 Plaintiff's 28 show?
 10 A. The location of where Mrs. Larsen was on the roadway
 11 on Scarcello Road.
 12 Q. How about 29, what's that a photograph of?
 13 A. Another closer version without the cover depicting
 14 the position of her body on the roadway.
 15 Q. And then finally 30, what's that a photograph of?
 16 A. The roadway just west of Mrs. Larsen showing a mark
 17 on the roadway that appeared to be part of the incident.
 18 Q. These three photographs, 28, 29 and 30 are accurate
 19 photographs of the area at the time that you took them?
 20 A. Yes.
 21 MR. VERHAREN: Move to admit 28, 29 and 30.
 22 MR. CHAPMAN: Your Honor, we object to all three of
 23 these.
 24 THE COURT: We will discuss those prior to the court
 25 considering their admission as well, thank you.

1 Q. (By Mr. Verharen) Let's do four this time. Show
 2 you Plaintiff's 31, do you recognize that one?
 3 A. Yes, I do.
 4 Q. What's that a photograph of?
 5 A. It's from the south side of the roadway near
 6 Mrs. Larsen showing a mark on the roadway near the center
 7 line.
 8 Q. How about 32?
 9 A. Closer, a close-up of Mrs. Larsen and her injuries.
 10 Q. How about 33?
 11 A. A closer version of that close-up of the injuries
 12 and blood and a tear.
 13 Q. And finally 34?
 14 A. This is from the south side of the roadway
 15 looking -- from the north side of the roadway looking south
 16 depicting the injuries to Mrs. Larsen's skull and blood
 17 trail.
 18 Q. These are accurate photographs of that particular
 19 area at the time you took them?
 20 A. Yes.
 21 MR. VERHAREN: Move to admit 31 through 34.
 22 MR. CHAPMAN: Judge, we object to all of these.
 23 THE COURT: Again we will discuss those during the break
 24 and determine the admissibility of those exhibits. If you
 25 will tender those to the court.

1 Excuse me, just so there is no problem, these
2 photographs again were taken under the same conditions that
3 Mr. Chapman has been asking you about?

4 WITNESS SERGEANT CARRINGTON: Yes, sir.

5 THE COURT: Continue.

6 Q. (By Mr. Verharen) The Last three photographs I
7 have are 35, 36 and 37. What's 35 a photograph of?

8 A. Scarcello Road taken from the eastbound lane
9 depicting a position of Mrs. Larsen and the white car.

10 Q. What about 36?

11 A. It's a close-up version of Mrs. Larsen's injuries to
12 her skull.

13 Q. And finally 37?

14 A. Another closer close-up of Mrs. Larsen's facial
15 injuries.

16 Q. These are all accurate photographs of Mrs. Larsen at
17 the time that you took them?

18 A. Yes.

19 MR. VERHAREN: Move to admit 35, 36 and 37.

20 MR. CHAPMAN: Judge, again we object to these
21 photographs.

22 For the record, sir, the court has ruled, but we
23 object to the manner in which they're being tendered in this
24 court.

25 THE COURT: Those exhibits again will be considered here

1 shortly. Thank you.

2 MR. VERHAREN: Judge, at this point in Sergeant
3 Carrington's testimony I would ask to have some of those
4 photographs published, but maybe it makes more sense to talk
5 about the photographs you haven't admitted yet.

6 THE COURT: Why don't we do that, probably be good time,
7 I'll give the jurors a break here.

8 Members of the jury, we'll go ahead and you folks
9 take a recess, we will discuss the matters here outside your
10 presence. I'll admonish you and remind you, you will hear
11 this a lot throughout the course of the trial, you're not to
12 discuss the matter, don't form or express an opinion about it
13 until it is finally submitted to you.

14 Why don't you folks take a break, we will take up
15 some matters and we'll probably just make this our morning
16 break, and then we'll come back and we'll proceed until lunch.

17 In fact we'll go ahead and take a few minutes and
18 come back and discuss these matters.

19 (Recess)

20 (WITHOUT THE JURY PRESENT)

21 THE COURT: I believe we have objections to a number of
22 photographs. Perhaps we should simply, well, I have looked
23 them over and obviously I would estimate we have similar
24 objections that pertain to a number of these photographs. I
25 don't know whether you want to address your objections one at

1 a time or collectively in some fashion, Mr. Chapman. I'll let
2 you go ahead and proceed with your objections, go ahead.

3 MR. CHAPMAN: Your Honor, probably would be helpful to me
4 and to the court to -- we're admitting them three and four at
5 a time. Probably be best to speak of them one at a time.

6 THE COURT: That's fine. I think they were handled by
7 the state three at a time, but the court only admits them one
8 at a time.

9 MR. CHAPMAN: Yes. Could we start with number 10, sir?

10 THE COURT: Certainly.

11 MR. CHAPMAN: Judge, for the record number 10 is a
12 depiction of a yellow tarp on a roadway with a stream, of what
13 appears to be blood, flowing from it. Your Honor, our
14 objection to number 10 is, number 1, it's cumulative. We have
15 admitted several other photographs, I believe, showing the
16 location of the yellow tarp. Number 10 with a trail of blood
17 flowing from it is both cumulative, it's more prejudicial than
18 probative of any relevant fact at issue in this matter, and
19 this same argument goes to 26, 27, 28, 29, 30, 31, 32 -- well,
20 26 through 37.

21 Judge, those are gruesome photographs. The
22 admission of those photographs is cumulative. It's certainly
23 more prejudicial than probative of any fact at material issue
24 in this matter. Quite frankly, Judge, they're disrespectful.
25 They're disrespectful of the deceased lady. They're

1 disrespectful of this court, and they're certainly
2 disrespectful of this jury. This is sensationalism, Judge,
3 and that's the only way to put it. They are more prejudicial
4 than probative. They are offered to apparently to inflame the
5 jury. Certainly they're not offered to address any material
6 fact in issue. In opening statement, the fact that the lady
7 is deceased is admitted, Judge.

8 Just for the record, sir, I would like to remind the
9 court that Miss Taylor attempted to get pretrial rulings on
10 these matters, didn't work out that way. I don't mean to
11 point any fingers. The court would remember, we tried to get
12 this argument taken care of before we had a jury sitting in
13 there.

14 Judge, those photographs, most of them are
15 inflammatory. They're more prejudicial than probative. It's
16 been pointed out to this jury that a foundation is lacking as
17 to scene security when the lieutenant, is it, ma'am?

18 WITNESS SERGEANT CARRINGTON: Sergeant, thank you.

19 MR. CHAPMAN: Excuse me, when the sergeant took the
20 photographs we have no evidence showing this jury that the
21 scene had not been tampered with. I believe some further
22 evidence is going to lay some significant doubt as to the
23 scene security at the time and to the integrity of the crime
24 scene. That aside, sir, we don't need those. He jury doesn't
25 need those. The court doesn't need those. And they're purely

1 inflammatory and more prejudicial than probative.

2 Thank you, sir.

3 THE COURT: Mr. Chapman, there's certainly some
4 photographs that appear to be very disturbing in terms of the
5 physical condition of the deceased here. As you indicated, I
6 think there is certainly no disagreement that she is deceased
7 in this case. Deputy Carrington testified to that fact
8 without objection. But there are some here that I don't think
9 really appear to display any type of such content, and perhaps
10 you can address those before we hear from Mr. Verharen.

11 I have exhibit 26, exhibit 16, exhibit 27, exhibit
12 17 and exhibit 10. And while there may certainly be some
13 graphic depiction connected with some of those, they certainly
14 appear to be distinctively different than some of the other
15 one. I guess for lack of a better term, the body is covered.
16 And I don't know if there's some other problems with those
17 photographs that you want to address.

18 MR. CHAPMAN: May I confer with my team, sir?

19 THE COURT: Absolutely.

20 MR. CHAPMAN: If I may, Judge?

21 THE COURT: Please.

22 MR. CHAPMAN: For the record I have spoken to you about
23 Plaintiff's 10. Judge, I'd posit to the court, our main
24 objection to Plaintiff's 10 is that it's gruesome.

25 THE COURT: Thank you.

1 MR. CHAPMAN: When you consider Plaintiff's 10, sir, in
2 light of Plaintiff's 26, I don't see why we need them both.
3 If 10 comes in, 26 is cumulative. 26 seems to be less
4 inflammatory than 10 does.

5 THE COURT: Thank you.

6 MR. CHAPMAN: As to 17, 27 and 16, Judge, our primary
7 objection to those is that they are cumulative in light of the
8 other ones that we did not so strenuously object that the
9 court did admit.

10 THE COURT: Thank you, Mr. Chapman. I think to speed
11 things up a little bit, Mr. Verharen, I would agree that
12 exhibits 16, 17 and 27 are cumulative, but certainly a ruling
13 on a cumulative exhibit certainly is a discretionary call by
14 the court. I don't think that I really perceive in any of
15 these photographs anything that would amount to something that
16 reflects an unduly prejudicial offer. And so in light of the
17 cumulative objection, I'm prepared to allow exhibits 16, 17
18 and 27 to be admitted. So I don't think we need to address
19 any argument on those exhibits. I appreciate that they do
20 appear to be cumulative, but I fail to see that it will
21 provide any problem with the jury's consideration. And so
22 those exhibits can be admitted.

23 But I would agree with Mr. Chapman, at least
24 preliminarily, we had some concern about the balance of those
25 exhibits, and maybe we need to address that.

1 MR. VERHAREN: Thank you, Judge. May I do that through
2 testimony as an offer of proof? Would you like me to make an
3 offer of proof or testimony through Sergeant Carrington?

4 THE COURT: Why don't you make your offer of proof and
5 then we'll see if we need to expand on that.

6 MR. VERHAREN: Thank you, Judge. May I see the
7 photographs?

8 THE COURT: Certainly.

9 MR. VERHAREN: I believe Sergeant Carrington, in terms of
10 number 26, will testify that this picture depicts the distance
11 between the tail end of the Honda, which is not visible over
12 here, and the body of the deceased, and that's why 26 is a
13 necessary photograph. I believe that --

14 THE COURT: Didn't anybody take any measurements at the
15 scene?

16 MR. VERHAREN: Yes.

17 THE COURT: Continue.

18 MR. VERHAREN: Number 10 is, I think, the only photograph
19 taken from the eastbound location beyond Mrs. Larsen looking
20 the other way. I think there was a photograph that was closer
21 to the tail end of the Honda. I might be wrong, but I believe
22 there is a photograph on the other side of Mrs. Larsen, I
23 might be wrong about that, but that's how I see number 10.

24 In then in terms of 30 here, 30 shows a blood smear
25 that goes about 10 feet down the road here. It also shows a

1 patch of Mrs. Larsen's hair here. And I think that's
2 necessary testimony here when we're going to talk about
3 where Mrs. Vonette Larsen was when she was struck, the blood
4 smear and the hair is.

5 And then in a similar fashion number 28 shows the
6 same thing, but it's a different angle of the blood smear.
7 Again this blood smear is very important in this case because
8 it indicates where she was when she was struck. And this is
9 simply a different angle of that blood smear running along the
10 double yellow line here on the bottom. This is another angle
11 of the blood smear running along the double yellow line and it
12 gives an indication of how far that smear extends. It's also
13 a photograph from the top part of Mrs. Larsen's body looking
14 down, and I think gives a good indication of the level of the
15 roadway, because you can see that the blood flow is going that
16 way. So I think those two reasons are the basis for this
17 photograph.

18 This one right here, number 32, that's simply a
19 further away photograph of the injury to her hand here, the
20 injury to her side, and the torn clothing here is all
21 consistent with what happened out there.

22 The next one here that I have, number 33, is simply
23 a close-up of the tear in her clothing as well as the injury
24 to her hip. That's the reason for those photographs.

25 This is another angle of-- and I'm looking at number

1 29 here, another angle to the injury to her hand here and a
2 different angle to the injury to the side of her hip and her
3 torn clothing.

4 Q. It also is a close-up photograph of her hair that's
5 on the road there and a different part of blood, not the blood
6 trail that's going this way but a different part of the blood
7 that's on the roadway here. It also depicts blood down near
8 by her feet on this part of the photograph.

9 And then 31 is a different angle. I believe these
10 photographs are simply a person walking around Mrs. Larsen
11 from different areas and what they could observe, and this is
12 a slightly different angle here, 31 is, giving a good
13 indication of the blood by her foot that I was talking about,
14 her hair and then the blood trail leading away from her, as
15 well as the injuries here on her hip and hand.

16 This one right here, Judge, the most important thing
17 about this photograph --

18 THE COURT: The number again, sir?

19 MR. VERHAREN: Number 35, is the acceleration marks that
20 lead up to Mrs. Larsen's body, and these are clearly visible
21 here in this photograph coming around the tail end of the
22 Honda into the wrong lane of travel. This also gives you an
23 indication, a complete indication of the blood smear here.
24 It also gives you an indication of the severe grade of the
25 road based on the blood trail.

1 Finally, the last two here, Judge, number 36 and
2 number 37, they're a close view of the injury to Mrs. Larsen's
3 left side of her head and her jaw, and a closer view of that
4 injury here in 37, those two things.

5 Beyond the fact that this is a murder case, I think
6 the jury is entitled to see the manner in which the victim
7 died. I believe that there is going to be testimony here from
8 the victim's husband that when he struck and ran over
9 Mrs. Larsen, Joel Larsen could see that the wheels on the
10 Blazer were bucking up and down as it passed over her head.
11 Nd I think these photographs right here of what he saw there
12 corroborate his testimony, and obviously they also corroborate
13 the state's case that he ran over her head and essentially
14 crushed her head, so I think that's also relevant.

15 THE COURT: Why don't you return the exhibits to the
16 court, and I'll hear any response from Mr. Chapman.

17 MR. CHAPMAN: Counsel is correct, state has chosen to
18 charge this as murder. This is a murder case. I would posit
19 to the court that I have done a murder case or two and usually
20 we have someone called a medical examiner that takes the stand
21 and testifies about injuries. Usually we have on the state's
22 witness list are EMTs, are officers that observed the
23 injuries. Again, sir, please consider what is at issue in
24 this matter. 30 different angles of this poor lady lying
25 there in the road.

1 If the state, Judge, wants to, if their true
2 motivation, I should say, is to show acceleration mark, is to
3 show torn clothing, I still don't see how that's much of an
4 issue in this case, but we could crop those out, they could
5 crop those out. They can take them down, if they have a
6 legitimate point to prove, they could crop those down, show
7 that particular portion of the photograph. I don't think
8 they'd hear, I can't guarantee it, but I don't think they'd
9 hear a whole lot of screaming about a picture of a piece of
10 torn clothing or about a picture of acceleration mark. That I
11 think they're going to have numerous other close-ups of
12 anyway, without the sensationalism that is coming before this
13 jury, risk prejudicing this jury, risk of confusing the issues
14 before this jury, and boring this jury, if they can be bored
15 by something that gruesome, by cumulative evidence.

16 Judge, we'd ask you to exclude all of these. I
17 understand the court has ruled on some, but that kind of gore
18 isn't necessary in this case, Judge, it's just not.

19 Thank you.

20 THE COURT: Thank you.

21 The question basically is the question of relevance
22 here, and the objection isn't so much that the exhibits are
23 not probative of certain issues that the state needs to
24 establish in this case, but that they are unduly prejudicial.
25 Certainly the state has a number of elements to establish.

1 One of them would be that Mrs. Larsen is deceased. That's a
2 critical element of a homicide allegation. I'm not sure they
3 haven't established that through the unobjected testimony from
4 Sergeant Carrington here, but I'm sure that the state also is
5 entrusted with the obligation of establishing the causation of
6 the death as far as the mechanics of the automobile accident.

7 I heard the opening argument here today on behalf of
8 Mr. Ellington, I'm not even sure that there is a great deal of
9 dispute that Mr. Ellington's vehicle struck Ms. Larsen,
10 particularly not even in the fashion that might be depicted in
11 these photographs. Appears to me that the issue in dispute is
12 why he struck Ms. Larsen, whether he struck her in some
13 intentional fashion or whether he struck her in some
14 inadvertent fashion attempting to leave the scene. Now
15 certainly these photographs may have some probative value in
16 that direction.

17 On the other hand, it escapes me that the state
18 cannot establish either through the description of a witness
19 such as Sergeant Carrington, the descriptions of accident
20 reconstructionists employed by the state, description of
21 medical examiners with respect to each and every one of these
22 issues.

23 I recognize that a murder case certainly establishes
24 that there is a deceased and there is a certain amount of
25 blood and gore, so to speak, that might be attendant to such a

1 case, and I think that's basically inescapable. But I think
2 the question really is whether these exhibits would be unduly
3 prejudicial for the jury to examine. And quite frankly I
4 think the majority of these in fact fit into that category, at
5 least at this stage of the proceedings.

6 If the defense is going to raise some question as to
7 the location of the injuries and the manner in which the
8 deceased came to her demise, then perhaps that may open the
9 door to the admissibility of these exhibits. But it seems to
10 me that otherwise for the most part they could be established
11 clearly through other evidence from the state that would not
12 raise to the level that would concern the court and create a
13 situation of undue prejudice.

14 And so at this point in time, anyway I'm prepared to
15 deny admission of certain exhibits. And again should we
16 establish through later evidence that we cannot produce the
17 position that the state is attempting to argue without the
18 admission of some photographs, we can reconsider that. But
19 Right now I think exhibit 34, exhibit 32, exhibit 29, exhibit
20 35, most particularly exhibit 36 and exhibit 37, those at this
21 point will not be admitted absent some further showing by the
22 state that probative value in fact exceeds the undue
23 prejudicial impact of those photographs. I think exhibit 26
24 can be admitted.

25 Exhibit number 30 and exhibit number 28 have been

1 offered for purposes of establishing the presence of the marks
2 on the roadway that are purported to be spear mark of blood
3 and perhaps hair belonging to the deceased. Exhibit 28
4 certainly reflects a trail of blood attendant to that, but at
5 least the victim's body is covered, and that exhibit I will
6 allow to be admitted. Exhibit 30 will not be admitted at this
7 point. And exhibit 10 will be admitted. Exhibit 26 and
8 exhibit 31 will not be admitted again at this point.

9 I think admitting exhibit 10 certainly shows the
10 position of the deceased body in relation to the white car and
11 the red vehicle in the roadway. It certainly does show a
12 blood stream, however, the body is covered and I think it
13 establishes the purpose for which the state has offered it
14 without being unduly prejudicial, and I think the same has
15 been established with exhibit 28. So 28 and 10 will be
16 admitted.

17 The rest of them I will reject at this point in time
18 absent a more sufficient showing from the state.

19 MR. VERHAREN: Thank you, Judge, may I take another stab
20 at 35?

21 THE COURT: At 35, go ahead.

22 MR. VERHAREN: Judge, it's the state's position here
23 and this murder case is based on the fact that rather than
24 Mr. Ellington driving off into the proper lane of travel,
25 which would have been the eastbound lane here after he backed

1 off the Honda, he chose to make a very hard left turn and
2 drive into the wrong lane of travel, the westbound lane of
3 travel. And that photograph number 35 shows those tracks very
4 clearly.

5 There are some other photographs that depict the
6 tracks, but I would say number 35 is the best photograph that
7 shows the Blazer acceleration tracks around the corner of the
8 Honda to the body of Mrs. Larsen.

9 THE COURT: I think that probably is my point exactly. I
10 would expect you will have an accident reconstructionist who
11 is going to establish the position and the location of those
12 tracks, and certainly demonstrate that for the purposes of the
13 jury. If the defense wants to dispute that there are tracks
14 there in that location, then we may have to resort to the
15 exhibit. But if in fact that's not going to be an issue in
16 dispute that this appears to not serve a purpose that you
17 can't accomplish through some other legitimate non unduly
18 prejudicial evidence.

19 MR. VERHAREN: Thank you, Judge. Actually I can't do
20 that because by the time the reconstruction officer got to the
21 scene and started doing his job, there were acceleration marks
22 that curve around the Honda there, the last part of the curve
23 were not visible to him. And so the reconstruction he did in
24 his diagram that he made do not have the very sharp corner
25 there that's depicted on that photograph.

1 So I cannot do that and that's why that photograph
2 is so crucial to the state's case because you can clearly see
3 those track marks looping around the Honda in that very hard
4 left turn in the wrong lane.

5 THE COURT: I appreciate that, but I still think that
6 Sergeant Carrington was there and observed it, and if
7 photographs were presented to an accident reconstructionist
8 and opinions were derived at based on looking at photographs
9 and testimony of officers on the scene, I think we can
10 certainly establish where those marks were. If the defense
11 wants to contest the presence of those marks, then that
12 certainly would change the probative value of this particular
13 exhibit.

14 So I'll certainly note that and we'll see how things
15 progress here. But at this point in time I'll allow 35 to
16 remain unadmitted. Thank you, Mr. Verharen.

17 Anything else on the exhibits at this point?

18 MS. TAYLOR: Judge, as a housekeeping measure, can you
19 tell me which ones that we objected to that you admitted and
20 which ones you didn't?

21 THE COURT: I'm not sure I kept as good of track for your
22 purposes as I should have. Exhibit 10 there was objection to,
23 it's been admitted. Exhibit 28 there is an objection to that
24 has been admitted. There was exhibit 26 that has been
25 admitted. I think it's those three exhibits have been

1 admitted.

2 MS. TAYLOR: Just the three, thank you, Judge.

3 THE COURT: I realize they certainly establish some
4 details that are undesirable for exposure, but I don't think
5 that that's avoidable in a case like this. Nonetheless they
6 may establish probative value that the state is seeking.

7 MR. VERHAREN: I'm unclear as to which ones weren't
8 admitted, Judge.

9 THE COURT: Exhibit 10, exhibit 28 and exhibit 26 were
10 admitted. So right now we have not admitted 16, 17, 27, 29,
11 30, 31, 32, 33, 34, 35, 36 and 37.

12 MR. VERHAREN: I can't go that fast, Judge, we have to
13 delete them off this Power Point here. I got up to 27, what's
14 after that?

15 THE COURT: All right, I'll start over again. Exhibits
16 16, 17, 27, 29, 30, 31, 32, 33, 34, 35, 36 and 37. Those have
17 not been admitted at this point.

18 Have you got those straight, Mr. Verharen?

19 MR. VERHAREN: I do, thank you, Judge.

20 THE COURT: I appreciate that. Anything else on thees
21 photographs before we have our jury return?

22 MR. VERHAREN: It will take me a minute to get all fixed
23 up here, Judge.

24 THE COURT: I think as we talked about earlier in
25 chambers, I know these photographs have been included in the

1 Power Point presentation. Mr. Verharen was going to be
2 prepared to eliminate any that might not be admitted so that
3 anything that is published to the jury would only be an
4 admitted exhibit. I think we're only dealing with our
5 technical concerns consistent with my rulings.

6 MR. CHAPMAN: Yes. By the way, Judge, since we couldn't
7 come to an agreement on this, we're going to be objecting to
8 Power Point presentation if these photographs are in fact
9 published to the jury. That would seem to be both cumulative
10 and again a waste of time. We have admitted them this way,
11 they can be published this way. To do the Hollywood thing is
12 not necessary in this case.

13 THE COURT: Mr. Verharen, I think that's a valid
14 objection if we're going to show the slide and pass the photos
15 out to the jurors.

16 MR. VERHAREN: I wasn't going to pass the photos out.

17 THE COURT: All right, I would certainly sustain that
18 objection. If we are going to publish the exhibits through
19 the slides, i think that's acceptable, as a matter of fact
20 it's more efficient.

21 MR. CHAPMAN: I would like to know what's going back in
22 the jury room, the slides or the pictures?

23 THE COURT: Simply the pictures.

24 MR. CHAPMAN: Then, Judge, we don't need to publish them
25 via electronic means.

1 THE COURT: The offering party always has the right to
2 publish an admitted exhibit to the jury. We can publish that
3 either through the actual hard copies that will be admitted or
4 through the slides, which is simply a method to make it more
5 convenient rather than have each juror look at a photograph
6 and pass those around. I think it's a little more efficient
7 to have the photograph published, plus counsel may wish to
8 have a witness testify with respect to what is observed on
9 that photograph. So I think it's an appropriate means of
10 publishing an admitted exhibit. I'll note the objection.

11 MR. CHAPMAN: Thank you, sir.

12 MR. VERHAREN: May I confer with your clerk one more
13 time?

14 THE COURT: Fire up the machine so we make sure it's
15 working before the jury comes in. Let's run through the
16 admitted photographs so they're displayed proper. If we make
17 mistakes, make it without the jury present.

18 I have the admitted exhibits in order so I'll follow
19 along.

20 MR. VERHAREN: I'm not sure they're going to have any
21 value with the lighting in here, Judge.

22 (Displaying slides on the screen)

23 MR. VERHAREN: I think that was it, Judge.

24 THE COURT: Certainly appears to be consistent with the
25 court's ruling.

1 MR. VERHAREN: Based on the lighting in this courtroom,
2 Judge, I think I'm not going to use the Power Point because
3 you can't see anything. So with the court's permission I'd
4 have the witness approach the jury and point out on each
5 particular photograph what's visible.

6 THE COURT: We have that bright light coming through the
7 window. I don't know if we can move it anywhere. If that's
8 how you want to do it, then I guess we'll proceed in a
9 different fashion.

10 MR. VERHAREN: Thank you, Judge.

11 THE COURT: We will bring our jury back in.

12 (Concludes without the jury present)

13 (JURY IS PRESENT)

14 THE COURT: Ladies and gentlemen of the jury, I think
15 we are ready to get under way. The court has ruled that
16 exhibit 10, exhibit 26 and exhibit 28 will be admitted.

17 Mr. Verharen, the court, at least at this point in
18 time, will deny the admission of the balance of the exhibits.
19 So with that you can continue.

20 MR. VERHAREN: Thank you, Judge.

21 With the court's permission could the witness come
22 and stand before the jury?

23 THE COURT: That would be fine. If counsel wants to
24 position themselves in a location so they can see.

25 MR. CHAPMAN: Judge, I'd object. The exhibits have been

1 admitted, the exhibits speak for themselves, this is

2 unnecessary, just a waste of time.

3 THE COURT: I'll allow to you continue, Mr. Verharen.

4 MR. VERHAREN: Thank you, Judge.

5 THE COURT: If you want to position yourself so that you
6 can observe the demonstration by the witness, that would be
7 fine, Mr. Chapman.

8 Q. (By Mr. Verharen) Sergeant, probably somewhere
9 right in here so the jury can see, and I'm going to show you
10 exhibits one at a time, starting with exhibit 10. If you can
11 first of all indicate for the jury, and show the jury so they
12 can all see various things that you saw that are depicted in
13 that photograph.

14 MR. CHAPMAN: Objection, cumulative, Your Honor.

15 THE COURT: Overruled, continue, please.

16 A. This is Scarcello Road looking westward towards
17 Highway 41. This is Mrs. Larsen. The white passenger car and
18 the maroon passenger car, the debris field. And the cant of
19 the roadway, the private driveway. And there's some slight
20 road markings here.

21 MR. CHAPMAN: Objection, foundation.

22 THE COURT: I believe the witness testified to road
23 markings, I don't believe there is anything of any specific
24 nature, so I'll overrule.

25 Q. (By Mr. Verharen) What's this stuff right here?

1 Q. And then can you see one on the other side as well?

2 A. Only slightly. Goes across this light part of the
3 roadway.

4 Q. These two tracks here that curve around the Honda,
5 this one and this one, about how far do these tracks go to the
6 edge of the road?

7 A. They appear to go right to the edge of the road.

8 Q. In terms of these marks on the road that are visible
9 here in this photograph, how far out did they extend beyond
10 the tail of the Honda?

11 A. I would be approximating.

12 Q. In terms of Mrs. Larsen's body, how far did they go?

13 A. Out from the end of the Honda?

14 Q. Out from what we can see there in that photograph,
15 how far did they go to Mrs. Larsen's body?

16 A. About 25 feet.

17 MR. CHAPMAN: Judge, I'd ask you to strike that.

18 A. That's approximate.

19 MR. CHAPMAN: Excuse me, Your Honor, I object and ask you
20 to strike that as an approximation.

21 THE COURT: I'll overrule, testimony will stand.

22 Continue.

23 Q. (By Mr. Verharen) Let me ask you this question, do
24 those marks that are visible there curving around the Honda,
25 did they go all the way to Mrs. Larsen's body?

1 A. This is the first aid kit right here. I think this
2 is Deputy Klinkfus's first aid kit, I'm not sure, but there
3 were other medics there on scene. You can see the latex
4 gloves here.

5 Q. Let's move on to the next one here, it's number 11,
6 can you show us what's visible in that photograph, please?

7 A. The different angle from the scene. Mrs. Larsen.
8 Looking westward on Scarcello. This is the white Honda, you
9 can see the airbags deployed. The debris field. The maroon
10 Subaru in proximity to the roadway and the angle of the Honda
11 as it's in the ditch on the north side of the road.

12 Q. And number 12.

13 A. This is on Scarcello, I'm standing in the eastbound
14 lane looking at the back of the Honda. It shows the debris
15 field here, the wheel off the roadway of the Honda and marks
16 on the roadway that could be tracks.

17 MR. CHAPMAN: Objection, foundation.

18 THE COURT: Sustained as to what they appear to be at
19 this point.

20 Q. (By Mr. Verharen) In terms of those marks on the
21 roadway, can you trace those with your fingers for us what you
22 could say that was real visible that day when you were taking
23 that photograph and what you can see on that photograph?

24 A. In this photographic I can see a mark leading from
25 this and curving around the Honda.

1 A. Yes, they did.

2 Q. And at the time you took that photograph and those
3 other photographs, were those marks that start at the edge of
4 the road and curve around the Honda and go to Mrs. Larsen,
5 were they clearly visible?

6 A. They were at that time.

7 Q. The marks here that go around the Honda that start
8 from the edge of the road and go to her body, is this the
9 eastbound or westbound lane of Scarcello Road?

10 A. This is the westbound lane. I'm looking northward,
11 the photo is looking northward.

12 Q. So a person traveling down the road here would be
13 going this way?

14 A. Correct.

15 Q. And then this would be the eastbound lane going this
16 way, is that right?

17 A. Correct.

18 Q. How about 13?

19 A. 13 is from the west side of a driveway that leads
20 south from Scarcello, I'm looking eastward, almost in a

21 northeasterly direction. It depicts the back end of the
22 Subaru, the marks on the roadway here, the debris field here,
23 the position of the Honda and the position of Mrs. Larsen and
24 the patrol units.

25 Q. How about 14?

1 A. 14 is from, I'm standing in Scarcello Road looking
2 at the driveway that goes south from Scarcello on the west end
3 of the scene. The driveway goes to a private residence and
4 the marks on the roadway leading across the driveway.

5 Q. Is this in front of the Subaru?

6 A. Yes.

7 Q. And these marks that you can see, do they extend to
8 this little snowbank here?

9 A. They appear to, yes.

10 Q. How about 15?

11 A. This is looking eastward on Scarcello Road from that
12 driveway and depicts Scarcello Road, the position of the the
13 Subaru, the Honda, Mrs. Larsen and the patrol units.

14 Q. Thank you. 16?

15 A. Again from the driveway it's looking eastward along
16 Scarcello showing the marks on the driveway gravel, Scarcello
17 Road, the Subaru, the Honda, the debris field, Mrs. Larsen and
18 the patrol units.

19 Q. 17, what's that depict?

20 A. I'm standing in the westbound lane of travel off
21 Scarcello Road looking eastward from the front of the Subaru
22 looking at marks in the roadway, the Subaru, the debris field,
23 the Honda and the position of the patrol units.

24 Q. How about 18?

25 A. 18 is a closer photograph of the Honda, I have

1 along the road in the ditch.

2 Q. 21?

3 A. 21 is looking from the Honda, and the mirror had not
4 been moved, looking from the Honda westward to depict the
5 marks in the roadside dirt and the pieces of the Honda in the
6 ditch.

7 Q. This piece right here, what's that?

8 A. I believe that's the front bumper.

9 Q. And its position in the ditch there, is that where
10 it was at the time you got to the scene until the time you
11 took this photograph?

12 A. Yes.

13 Q. 22?

14 A. It's another photograph looking eastward on
15 Scarcello with the Honda, and this one is at an angle that
16 shows more damage along the side of the Honda, the roadside
17 marks and also the marks on the roadway that lead to
18 Mrs. Larsen and to the other two patrol units.

19 Q. Are those tracks that start from the edge of the
20 roadway curve around the Honda and go to the body of
21 Mrs. Larsen, are they visible in that photograph?

22 A. Yes.

23 Q. Can you show us, please?

24 A. They go from here to here. From this point right
25 here right along here and go back.

1 walked into the scene from the Subaru along the north edge of
2 Scarcello Road in the westbound lane. It depicts the
3 condition and damage to the Honda, the pieces of the Honda in
4 the ditch of the roadway, roadway debris, marks curving on the
5 roadway, Mrs. Larsen and the patrol units.

6 Q. So in this photograph, number 18, these marks here
7 that curve around the Honda, were these the same marks that
8 you described for the jury in this one right here, Plaintiff's
9 exhibit 12?

10 A. Yes.

11 Q. And so number 18 is simply a different angle showing
12 the tracks to her body?

13 A. A different perspective of the scene, yes, sir.

14 Q. When you were there at the scene, these tracks that
15 curve around the Honda to the body of Mrs. Larsen, were they
16 visible all the way to the edge of the road?

17 A. Yes.

18 Q. How about 19?

19 A. 19 is again a closer version of 18 showing the
20 damage to the Honda, the marks in the roadway gravel, and
21 angle of the Honda into the ditch.

22 Q. 20?

23 A. 20 is a closer version looking eastward toward the
24 Honda. It shows what appears to be contact damage on the
25 Honda, a broken off side mirror and tire marks in the dirt

1 Q. 23?

2 A. 23 is looking toward the Honda from the south side
3 of Scarcello Road standing in the eastbound lane showing the
4 debris field, marks on the roadway leading from the center
5 line into the debris field, and the Honda damage and what the
6 status of the road was.

7 Q. Can you see the marks going around the Honda to
8 Mrs. Larsen body in that photograph?

9 A. From the rear of the Honda they are visible and they
10 curve to -- they curve to Mrs. Larsen, where Mrs. Larsen is.

11 Q. 24?

12 A. That's another angle of the Honda depicting its tire
13 off the roadway, the cant of the vehicle in the ditch, and the
14 front end damage and the shattered side window.

15 THE COURT: Sergeant, you might want to -- I think you
16 were describing some things with the exhibit pointing toward
17 you rather than the jury. I saw some of the jurors trying to
18 lean over.

19 WITNESS SERGEANT CARRINGTON: I know I had my back to
20 these ladies over here.

21 THE COURT: Do that again to make sure they have seen it.

22 A. This is exhibit 24. And this is the Honda, picture
23 closest to the Honda from the center of Scarcello, there's the
24 yellow line, looking northward, the damage to the Honda and
25 the fact that at a tilt with its rear wheel off the roadway.

1 Q. 25?

2 A. This is driver's side window of the Honda, it's a
3 close-up. And that white mark there is a flashlight
4 reflecting onto a smear that I was attempting to get on film.
5 The window was shattered but not broken through.

6 Q. Why were you attempting to get that smear on film?

7 A. Because of the reporting party's original story
8 that --

9 MR. CHAPMAN: Objection, Your Honor, the witness is about
10 to testify to hearsay or matters beyond her own personal
11 knowledge.

12 THE COURT: I think her response will stand based on the
13 reporting party's story, and that's why she took the
14 photograph. That will stand. Continue.

15 Q. (By Mr. Verharen) That smear mark there that you
16 can see in the photograph, is that the approximate location
17 where the driver of a vehicle might be located?

18 A. Yes.

19 Q. Where the head of the driver of that vehicle might
20 be located?

21 MR. CHAPMAN: Objection, that's speculation, Judge.

22 THE COURT: Overrule.

23 A. Could be, yes, depending on height.

24 Q. 26?

25 A. 26 is Scarcello Road. I am standing on the south

1 Q. (By Mr. Verharen) And you have photographs of
2 that?

3 A. Yes.

4 Q. And we're not going to show the jury those today?

5 A. No.

6 Q. Can you tell the jury where her feet were and where
7 her head was when you took those photographs?

8 A. As she was positioned under the tarp?

9 Q. Yes.

10 A. Feet were here near the center line and her head was
11 in a northwesterly direction.

12 Q. How was she positioned? We don't have any
13 photographs to show how she was positioned --

14 MR. CHAPMAN: Objection, asked and answered. And again
15 I'd ask the court to admonish counsel in this regard.

16 THE COURT: I don't think I'm going to do that. As I
17 ruled earlier, I made a point that the photographs would not
18 be admitted because the state has another method of
19 establishing that which was depicted in those photographs, and
20 I think that's what the state is attempting to do.

21 So continue, sir.

22 Q. (By Mr. Verharen) Can you tell us how Mrs. Larsen
23 lay there underneath that tarp?

24 A. She was on her back.

25 Q. And the question I had for you, do you remember what

1 edge of the roadway looking north. It's to show where
2 Mrs. Larsen was in relationship to the center of the roadway
3 and how far she was from the Honda, and also depicts a patrol
4 unit.

5 Q. Hold that up to the jury again. And I ask you about
6 this coming down from, we don't have any photographs of
7 Mrs. Larsen uncovered so it's hard to tell which side of her
8 body that we're looking at here.

9 MR. CHAPMAN: Objection to that statement, Your Honor,
10 I'd ask that that be stricken.

11 THE COURT: I think he's probably correct in terms of
12 the inquiry that you're making so I'll allow you to continue,
13 Mr. Verharen.

14 Q. (By Mr. Verharen) Were you able to see and did you
15 take some photographs of Mrs. Larsen with that yellow tarp off
16 her.

17 A. Yes. I did.

18 MR. CHAPMAN: Objection, Your Honor, in accordance with
19 the court's previous.

20 THE COURT: I believe we have got some foundation here if
21 you're trying to establish where her head and where her feet
22 are positioned in the roadway, I think that's appropriate and
23 you need to establish foundation for that purpose.

24 MR. VERHAREN: Yes, thank you, Judge.

25 THE COURT: Continue.

1 htis line here was that's visible in the photograph?

2 A. This line, this darkened area right here was a line
3 of blood --

4 MR. CHAPMAN: Objection, foundation.

5 THE COURT: I'm not sure what you were pointing to.

6 WITNESS SERGEANT CARRINGTON: I was depicting this line
7 right here.

8 THE COURT: All right, thank you. I'll sustain the
9 objection as to that.

10 Q. (By Mr. Verharen) That line here that you're
11 pointing to, what color was it?

12 A. Red.

13 MR. CHAPMAN: Objection, asked and answered, Judge, the
14 exhibit speaks for itself.

15 THE COURT: The witness was there, overruled.

16 Q. It was red?

17 A. Yes, sir.

18 Q. About how long was that red line leading up to the
19 feet of Mrs. Larsen?

20 A. Approximately ten.

21 Q. How long?

22 A. Approximately ten.

23 Q. Ten feet?

24 A. Yes.

25 Q. And in that line of the red substance leading up to

1 her feet, was there anything else leading up to her feet? Let
 2 me ask you that question with another photograph. Have you
 3 ever seen blood before?
 4 A. Oh, yes.
 5 Q. How many times have you seen blood?
 6 A. I would have to estimate in 17 years.
 7 Q. Approximately?
 8 A. Over a thousand.
 9 Q. Is that in many of those occasions in crime scenes?
 10 A. Yes.
 11 Q. Are you familiar with how blood looks?
 12 A. Yes.
 13 Q. In terms of the red stain that was about ten feet
 14 leading up to the feet of Mrs. Larsen, was that consistent
 15 with blood that you have seen on prior occasions?
 16 A. Yes.
 17 Q. Let me jump ahead here. I'll go to 28. Can you
 18 describe what 28 is a photograph of?
 19 A. It's a closer version of the roadway where
 20 Mrs. Larsen was positioned looking north from the eastbound
 21 lanes of Scarcello Road.
 22 Q. Can you focus your attention, is the red substance
 23 that appears to be blood leading up to her feet, is that
 24 visible in that photograph?
 25 A. Yes, it is.

1 Q. If I could point something out to you, what is this
 2 brown looking splotch here?
 3 A. That's what appears to be hair.
 4 Q. A clump of hair there?
 5 A. Yes.
 6 Q. We can see blood coming here down towards the double
 7 yellow line there --
 8 MR. CHAPMAN: Objection, that assumes facts not in
 9 evidence, Judge, counsel well knows that.
 10 THE COURT: I can't see the exhibits, so why don't you
 11 just try to rephrase your question, Mr. Verharen.
 12 Q. (By Mr. Verharen) The red trail leading along the
 13 side of the yellow tarp here along the side of Mrs. Larsen,
 14 where was that coming from?
 15 A. A wound in her head.
 16 Q. And where in her head was that coming from,
 17 specifically what part of her head?
 18 A. The left side, up in her left top of the head.
 19 Q. Can you describe that wound for us, please?
 20 A. It was a gapping hole.
 21 Q. Is that the only direction the blood flowed that you
 22 could see coming from Mrs. Larsen's head?
 23 A. Yes.
 24 Q. And then the last one I have for you is 27, can you
 25 tell us what 27 is a photograph of?

1 A. Another view of the Honda looking northward, and
 2 it's depicting damage again to the Honda, and the marks that
 3 lead to Mrs. Larsen.
 4 Q. Could you show us over here, too?
 5 A. The damage to the Honda and the marks that lead to
 6 Mrs. Larsen.
 7 Q. Are you talking about the marks right here?
 8 A. Yes.
 9 Q. Was this a mark here that you can see in the
 10 photograph, is that that a mark that was visible also when you
 11 were there, that one right there?
 12 A. Yes.
 13 Q. Thank you. I think you can probably take the stand
 14 again.
 15 (The witness returned to the witness chair)
 16 Q. (By Mr. Verharen) Ma'am, about how long were you
 17 there for?
 18 A. I'd have to estimate about 50 minutes.
 19 Q. Do you know who was assigned as the investigator of
 20 this incident?
 21 A. Sergeant Maskell.
 22 Q. And at some point when you left, were there other
 23 law enforcement there?
 24 A. Oh, yes.
 25 Q. Who was that?

1 A. There was Deputy Klinkufus. There was Lieutenant
 2 Edmondson. I don't recall if Lieutenant Mattos had left prior
 3 to that. And both of my law enforcement officers on either
 4 end of the area.
 5 MR. VERHAREN: Thank you. No further questions.
 6 THE COURT: Thank you, Mr. Verharen.
 7 Cross-examination, Mr. Chapman.
 8 CROSS-EXAMINATION
 9 BY MR. CHAPMAN:
 10 Q. Ma'am, were there medics there?
 11 A. Yes.
 12 Q. I think the question that Mr. Verharen asked you was
 13 about law enforcement. From the time of the accident until
 14 you arrived at the scene, how many cars drove through there?
 15 A. I don't know.
 16 Q. You don't know, you watched -- well, you said Deputy
 17 Klinkufus was there?
 18 A. Yes, sir.
 19 Q. Did his car have a video, do you know?
 20 A. Yes, it does.
 21 Q. Have you watched that?
 22 A. I have.
 23 Q. Were there cars driving through there?
 24 A. I didn't see one. I saw an ambulance.
 25 Q. You saw an ambulance, you didn't see any civilian

1 vehicles?
 2 A. Not drive through the center of the scene, no.
 3 Q. Okay, Ma'am, how long did it take you to get
 4 there? You might have told us, but I don't remember.
 5 A. I originally stopped at the eastern perimeter and
 6 waited to be relieved. So it took me probably 15 minutes to
 7 reach the scene, 10 to get to the perimeter.
 8 Q. And that's after you got the call?
 9 A. Yes, sir.
 10 Q. Did you see, I think you told us, two young ladies
 11 that were rather hysterical at the scene?
 12 A. Yes.
 13 Q. Was one of them still on a phone?
 14 A. I believe so.
 15 Q. You believe so. Did you activate a camera when you
 16 drove up to the scene?
 17 A. I don't have one, sir.
 18 Q. You don't have one. Do you drive a marked patrol
 19 car?
 20 A. I do.
 21 Q. That just happens to be one without the video
 22 camera?
 23 A. Yes, sir.
 24 Q. People were walking through this scene when you
 25 drove up, weren't they?

1 over.
 2 Ma'am, you've had, you're a sergeant and you have
 3 been a sergeant, well, you have been with Kootenai County for
 4 a long time; is that right?
 5 A. Yes, sir.
 6 Q. Is that a fair statement?
 7 A. Yes.
 8 Q. You've had a lot of training to hold a position that
 9 you hold now, don't you?
 10 A. Yes.
 11 Q. Do you have a college degree?
 12 A. No.
 13 Q. But you have been through law enforcement schools?
 14 A. Yes.
 15 Q. You know what a post is, not a post, do you know
 16 what POST is?
 17 A. Police officer standard and training?
 18 Q. That's what I was trying to get at, ma'am.
 19 A. Yes.
 20 Q. Ma'am, do you hold a supervisory certificate?
 21 A. I do.
 22 Q. You have had a lot of training in your profession?
 23 A. Yes.
 24 Q. Is it important to establish exact times and events
 25 when there is an incident like this?

1 A. Medical staff.
 2 Q. The medical staff. Law enforcement?
 3 A. I'd have to look at the video. I know I was, I was
 4 law enforcement and Deputy Klinkefus.
 5 Q. They were walking through the scene, were they not?
 6 A. Yes, sir.
 7 Q. When did people stop walking through the scene?
 8 A. I can't tell you that they were still law
 9 enforcement were still walking through the scene when I left.
 10 Q. When you left were the Larsens still there?
 11 A. No.
 12 Q. How long were you there before they were -- I think
 13 you told us they went to Rathdrum?
 14 A. 20 minutes. I'd have to estimate.
 15 Q. About 20 minutes?
 16 A. Yes, they were there when I got on scene and they
 17 were not there when I started photographing.
 18 Q. You were asked to do scene security, did I hear that
 19 right, ma'am?
 20 A. I was asked to set up a perimeter.
 21 Q. Set up a perimeter. Is that different than securing
 22 the crime scene or the scene of the incident?
 23 A. Yes.
 24 Q. Okay. So there is a difference between a secure
 25 area and a, well, I'm not asking that very well, let me start

1 A. Establish for me as a supervisor? I'm sure it is at
 2 some point.
 3 Q. Do you keep a -- is it sometimes important to keep a
 4 log of who enters the scene, who leaves the scene, exact
 5 times?
 6 A. When it's practical, yes.
 7 Q. When it's practical. Was it practical here, ma'am?
 8 A. Was it practical at this scene?
 9 Q. Yes.
 10 A. No, sir.
 11 Q. Why was that?
 12 A. Because it was secured at either end from any
 13 traffic and there was nobody but law enforcement there that it
 14 would code out on their radio, we would have a log of who was
 15 there.
 16 Q. So is it your testimony, ma'am, that from the time
 17 this incident happened that nobody but law enforcement, and
 18 perhaps medical, drove through there?
 19 A. As far as I know, yes.
 20 Q. Okay. Whose responsibility would it have been to
 21 establish either a scene log or secure the scene?
 22 A. The scene was secure with a perimeter.
 23 Q. But that wasn't my question. I asked whose
 24 responsibility would it have been to do that?
 25 A. To secure the scene?

1 Q. Yes, ma'am.

2 A. The officer that had the initial call who was

3 involved and who was basically the primary response officer

4 until he was relieved.

5 Q. Would that be Deputy Klinkefus?

6 A. Yes.

7 Q. Can you tell us how soon after the initial call the

8 scene was secured?

9 A. As soon as we could find the personnel to secure

10 it. I was on the east end. I had another officer responding

11 to the west end of Scarcello to seal the roadway off. It was

12 an active scene, we were looking for a fleeing person in a

13 vehicle.

14 Q. The reason that you want to secure a crime scene is

15 so that none of the evidence gets changed or altered, would

16 that be a fair statement?

17 A. Yes.

18 Q. At the time all those pictures were taken, I don't

19 believe we saw any medical personnel in there. Had the medics

20 already come and gone?

21 A. They had.

22 Q. Did the medics arrive when you were there?

23 A. No, they were already there when I got there.

24 Q. Did you keep a log or any other kind of evidence of,

25 at the time you took those pictures there's numerous units

1 A. He told me.

2 Q. Okay. Ma'am, one thing when you were visiting with

3 Mr. Verharen, it confused me a little, you started taking

4 those pictures at 1:30?

5 A. Yes, sir.

6 Q. Did you take most of them right around 1:30?

7 A. Between 1:30 and 1:40, yes.

8 Q. But yet you said the light was waning?

9 A. Yes.

10 Q. Why was that?

11 A. Because it was January 1st and it was also cloudy.

12 Q. So at 1:30 even on January 1st the sun isn't going

13 down, is it?

14 A. No.

15 Q. Ma'am, with all those pictures that we got a look

16 at, you said you didn't remember what kind of a camera it was,

17 is that correct?

18 A. It was a digital camera.

19 Q. A digital camera, do you remember a brand or

20 anything?

21 A. No, that's what I couldn't remember, a brand.

22 Q. That's something a trooper handed you?

23 A. Trooper Robnett, yes.

24 Q. Do you know what size of a lens it had?

25 A. No, I don't.

1 there, patrol units, correct, law enforcement?

2 A. There was a couple state troopers and a couple, my

3 car and then Deputy Klinkefus's car, yes.

4 Q. Did you make a note of what time those vehicles

5 arrived?

6 A. No, I didn't.

7 Q. Did you make a note of what route they took when

8 entering the scene?

9 A. No.

10 Q. Ma'am, did you see any molds taken, you showed us

11 those pictures of those vehicles involved?

12 A. Yes.

13 Q. Did you have molds taken have any of those tires so

14 they could be compared?

15 A. That wasn't my call. I didn't see any taken.

16 Q. But you didn't, I guess?

17 A. I didn't, no.

18 Q. Were you aware when you arrived that a weapon had

19 been fired at that scene?

20 A. Yes.

21 Q. When you arrived had steps been taken to secure that

22 weapon, to your knowledge?

23 A. When I arrived the weapon was secured in Deputy

24 Klinkefus's vehicle.

25 Q. How do you know that?

1 Q. Can you tell us mathematically, I'm not asking that

2 very well. Can you tell us, were any of those pictures that

3 we talked about with these folks, had any of those been

4 cropped?

5 A. Not to my knowledge, no.

6 Q. Did you remove those pictures from the camera?

7 A. I removed the disk they were on.

8 Q. Did you enter the disk into evidence?

9 A. No, sir, I gave it to Lieutenant Edmondson.

10 Q. Lieutenant Edmondson.

11 Q. Did you do that that day, ma'am?

12 A. Yes, I did.

13 Q. Is Lieutenant Edmondson your supervisor in Kootenai

14 County?

15 A. She is lieutenant of detectives, yes, sir.

16 Q. And so that's the last you saw of that disk?

17 A. Yes.

18 Q. On one of those pictures, ma'am, there was a light

19 that you said was a flashlight?

20 A. Yes.

21 Q. What time was that picture taken?

22 A. During the same time frame, between 1:30 and 1:40.

23 Q. So you took all those pictures in ten minutes pretty

24 much?

25 A. Walking around the scene, yes, sir.

1 Q. Just walking around the scene going click click?
 2 A. Trying to get as accurate depiction of the scene,
 3 yes, sir.
 4 Q. What kind of shoes were you wearing?
 5 A. My patrol boots.
 6 MR. CHAPMAN: You know, I think that's all I have for you
 7 right now, ma'am, and I thank you for your patience with me.
 8 THE COURT: Redirect.
 9 MR. VERHAREN: No questions, Judge.
 10 THE COURT: Sergeant Carrington, I think you can step
 11 down at this point. Can we excuse this witness?
 12 MR. VERHAREN: Yes, please.
 13 THE COURT: Any objection to Sergeant Carrington being
 14 excused?
 15 MS. TAYLOR: No, Judge.
 16 THE COURT: Thank you very much, Sergeant, you can step
 17 down, you're excused.
 18 WITNESS SERGEANT CARRINGTON: Thank you, sir.
 19 THE COURT: With that you can call your next witness.
 20 MR. VERHAREN: Yes, sir. Trooper Robnett.
 21 MS. TAYLOR: Your Honor, may we take just a brief few
 22 minutes before this witness testifies? I'm sorry.
 23 THE COURT: We're closing in on the lunch hour.
 24 Do you have a matter we need to take up?
 25 MS. TAYLOR: No. I had expected the Skeltons to be here

1 major crimes and death investigation.
 2 Q. Can you give us a general idea, please, of your law
 3 enforcement background?
 4 A. I began my law enforcement career back in 1975 when
 5 I entered the United States Air Force. Served in the Air
 6 Force Military Police for approximately five years. Got out
 7 of the service, attended the North Idaho College Law
 8 Enforcement program. Entered back into full time law
 9 enforcement service, I believe, back in 1987 and been at it
 10 ever since then.
 11 Q. Was that with the sheriff's department?
 12 A. I first started as a deputy sheriff with the Bonner
 13 County Sheriff's office up north in Sandpoint. I also worked
 14 a short while with the Sandpoint Police department, and came
 15 to the Kootenai County Sheriff's office in 1989.
 16 Q. How long have you been doing major crimes
 17 investigation?
 18 A. Approximately ten years.
 19 Q. Ten years?
 20 A. Yes.
 21 Q. Have you had any training in regards to that type of
 22 investigation?
 23 A. I have. I have attended several POST accredited
 24 training courses that are specific to crime scenes, crime
 25 scene analysis, that sort of thing, death investigation,

1 during this testimony and I need to call them and get them
 2 here.
 3 THE COURT: Can we do this in place?
 4 MR. VERHAREN: I can put another witness on, I can call
 5 Sergeant Maskell if they need some time.
 6 THE COURT: I don't have a problem with that, but it's so
 7 close to the lunch hour, once we break we have a tendency not
 8 to get back together in a brief period of time. Let's hear
 9 from Sergeant Maskell at this point, if you will come
 10 forward.
 11 BRAD MASKELL
 12 was called as a witness on behalf of the
 13 State, having been first duly sworn, was
 14 examined and testified as follows:
 15 DIRECT EXAMINATION
 16 BY MR. VERHAREN:
 17 Q. Please state your full name and spell your last
 18 name.
 19 A. My name is Sergeant Brad R. Maskell. It's
 20 M-a-s-k-e-l-l.
 21 Q. Can you tell us what you do for a living, please?
 22 A. I'm currently a major crimes detective with the
 23 Kootenai County Sheriff's department. I hold the rank of
 24 sergeant within the detective division. Also on an assistant
 25 supervisor in there. My current case assignment is again

1 homicide investigation.
 2 Q. And there is a term called POST certified officer,
 3 what does that mean?
 4 A. It means you're recognized by the state of Idaho as
 5 a certified police officer.
 6 Q. Does that mean you go down and you do a basic
 7 training and then they recognize you as POST certified?
 8 A. Correct, you attend the police academy and then you
 9 also complete certain levels of training to get the various
 10 different certificate levels.
 11 Q. What are the different levels?
 12 A. Starts out as a basic certificate, and then an
 13 intermediate certificate, and then it moves to an advanced
 14 certificate. And then the advanced certificate is the
 15 certificate of a peace officer. And then there are other
 16 certificates that include management and supervisory
 17 positions.
 18 Q. Which one do you have?
 19 A. The advanced and the supervisors.
 20 Q. Have you had occasion in the last ten years to
 21 investigate deaths?
 22 A. I have.
 23 Q. Approximately how many death investigations have you
 24 initiated in the last ten years or so?
 25 A. I believe in the last ten years I've been assigned

1 to approximately 3 to 400 death investigations.

2 Q. Have a number of those ended up being homicide
3 investigations?

4 A. Yes.

5 Q. When you're at a place where someone has died or a
6 death scene, what are you trying to determine?

7 A. Well, usually right off the bat I want to get a
8 sense for whether or not the death is a result of a criminal
9 action, or possibly an accidental situation, or possibly a
10 self-inflicted type of a situation, or possibly some other
11 mechanism such as a disease or old age or that kind of thing.

12 Q. And so then based on your training and experience
13 what you're trying to do is figure out how someone died?

14 A. Yes.

15 Q. Let me direct your attention to January 1, 2006.

16 At some point on that date did you get called up to Scarcello
17 Road?

18 A. I did.

19 Q. Where were you when that happened and about what
20 time was it?

21 A. It was approximately 1:15 in the afternoon. I was
22 off-duty, I was with my wife and family loading a load from my
23 storage unit into my pickup truck because I was moving that
24 day.

25 Q. And after you got that call, what did you do?

1 A. I received the call on my cell phone from Lieutenant
2 Edmondson who asked me to come into service and to respond to
3 the area and take charge of that investigation.

4 Q. Go ahead and continue.

5 A. I explained to her I'd be rather lengthy with my
6 response so I was going to have to get back home and off load
7 my family and get into my vehicle and start en route to the
8 scene.

9 Q. And at some point did you accomplish that?

10 A. I did.

11 Q. On your way up to that area, at some point did you
12 decide to go to another location before you got to the actual
13 scene where this happened?

14 A. Yes, I did.

15 Q. Can you tell us how that worked?

16 A. While I was on my way to the scene I had originally
17 intended to drive to the specific scene involved. I overheard
18 some radio conversations going on on the police radio that
19 indicated that they had located the person that they had
20 deemed was the suspect in this situation at a residence on
21 Scarcello Road, a distance to the east of the primary scene.

22 Q. And so based on that where did you head to?

23 A. What I did was I called Lieutenant Edmondson --

24 MR. CHAPMAN: Objection, nonresponsive.

25 THE COURT: Sustained.

1 Q. (By Mr. Verharen) Based on that where did you head
2 to?

3 A. The residence located on Scarcello Road.

4 Q. Whose residence on Scarcello Road?

5 A. That would be the Cunningham residence.

6 Q. Do you recall the address?

7 A. I believe it was 2223, as I recall, Scarcello Road.

8 Q. What time do you think you got to the Cunningham
9 residence there on Scarcello Road?

10 A. Shortly after two p.m., I believe in the
11 neighborhood of about 2:15.

12 Q. In the afternoon?

13 A. Yes.

14 Q. Can you describe for us the layout of that residence
15 and compare it to Scarcello Road just generally?

16 A. The residence, it's a property that sits on the
17 south side of Scarcello Road which runs east and west. There
18 is almost a circular driveway that accesses the property on
19 both the east and west side. The structures on the property
20 are comprised of there was a couple of mobile homes and a
21 small travel trailer there, some other small outbuildings, and
22 the two driveway entrances on both sides kind of merge back in
23 behind those structures.

24 Q. I'm going to jump you ahead a little bit. At some
25 point did you get down to the scene that day where this

1 happened?

2 A. I did.

3 Q. Did you determine how far away the Cunningham
4 residence was from the scene?

5 A. I did.

6 Q. Can you tell us the approximate distance, please?

7 A. Three-quarters of a mile.

8 MR. CHAPMAN: Objection, foundation.

9 THE COURT: Sustained.

10 Q. (By Mr. Verharen) How did you determine the
11 distance?

12 A. I drove it with my vehicle and clocked it on my
13 odometer as well as plotted it on a map with some software and
14 utilized software to determine it.

15 Q. And did you determine the distance?

16 A. Yes.

17 Q. What's the distance?

18 A. Three-quarters of a mile.

19 Q. Jumping ahead, did you get an opportunity to get up
20 in a helicopter?

21 A. I did.

22 Q. What was the reason for that?

23 A. I wanted to get some aerial pictures of the
24 intersection where this incident took place. And so I
25 contacted a friend who I know who has a helicopter company,

1 and he has offered in the past on numerous occasions to help
2 me with aerial photography. He was willing to come and donate
3 some time to take me up so I could get some pictures of the
4 scene.

5 Q. What type of photographs did you take of that area?

6 A. Overhead photographs. Numerous photographs from the
7 air depicting specifically the scene involved, the
8 intersection that you're going to hear a lot about, as well as
9 the intersection and how it relates to where the Cunningham
10 home is, kind of overall sort of shot.

11 Q. Let me dig those photographs out for you. First one
12 I want to show you is marked as Plaintiff's 3, do you
13 recognize that photograph?

14 A. Yes, I do.

15 Q. What's that a photograph of?

16 A. That's a photograph of the stretch of Scarcello
17 Road. The view is from the east looking towards the west.
18 Encompassed within this photograph would be the intersection
19 that I spoke of as well as the area where the Cunningham home
20 is located.

21 Q. What day did you take that photograph?

22 A. I believe I took this photograph on the 4th of
23 January.

24 Q. This year?

25 A. Yes.

1 Q. How about 7?

2 A. Number 7 is an image that I took specifically of the
3 Cunningham home overhead from a helicopter on the 4th of
4 January.

5 Q. These photographs here 3 through 7, are they
6 accurate photographs of the areas that they show that you took
7 on the 4th of January of this year?

8 A. Yes.

9 MR. VERHAREN: Let me move to move to admit 3 through 7.

10 MR. CHAPMAN: No objection.

11 THE COURT: Thank you. 3 through 7 will be admitted. 3,
12 4, 5, 6 and 7.

13 Q. (By Mr. Verharen) Let me show you what has been
14 marked as 8. What is number 8?

15 A. Exhibit 8 is an image that I was able to obtain
16 from -- Kootenai County has what's known as a GIS imaging
17 system that contains satellite photography of the entire
18 county. I thought it might be a good opportunity to get a
19 very high overview of the area to show the relationships of
20 areas and indicate the distances between points in the case.
21 So I created a blowup using the county GIS satellite mapping
22 system to produce this exhibit.

23 Q. Is that an exhibit that encompasses Scarcello Road
24 including the place where this incident happened, the
25 Cunningham residence, as well as the intersection there of

1 Q. So three days after this happened?

2 A. Yes.

3 Q. And is that an accurate photograph of the area from
4 the air?

5 A. Three days after the incident, correct.

6 Q. Let me show you this one, it's marked as Plaintiff's
7 exhibit 4, do you recognize that?

8 A. I do. This is another area photograph I took from
9 the air a little bit closer to that intersection that we were
10 just talking about. The view is down on the length of
11 Scarcello Road as it comes out of what you will hear the
12 S-turn, into that specific intersection and looking towards
13 the west.

14 Q. Taken the same day?

15 A. Yes.

16 Q. You have in front of you number 5, what's that a
17 photograph of?

18 A. Again this is an aerial photograph that I took on
19 the 4th of January from that helicopter. It's specifically
20 almost a directly overhead shot down onto the intersection
21 where this event took place.

22 Q. How about number 6?

23 A. This is a little bit closer view of the same
24 intersection, the view from the west side looking towards the
25 southeast encompassing the intersection and Scarcello Road.

1 Ramsey and Scarcello? Does it have those things on there?

2 A. Actually the road that is labeled Ramsey Road is
3 labeled incorrectly. That is not Ramsey Road. But the rest
4 of the image is correct.

5 Q. I've got a pen you can use, maybe we should cross
6 that out.

7 A. Right.

8 Q. Take your black pen here, maybe you could just cross
9 that out for us.

10 A. Sure. (Complied)

11 Q. That exhibit has some writing on it as well, can you
12 tell us about that?

13 A. What I did was I included some information on the
14 photograph. I have noted on the left side of the photograph
15 specific to the intersection where this occurred. I put some
16 text on there that says crime scene area. I've indicated the
17 incident date and time as being January 1, 2006, at
18 approximately 12:36. On the right side of the photograph you
19 can see a small residence there in the trees. I have labeled
20 that the Cunningham home. I have also put some text on the
21 photograph that says suspect John Ellington located here by
22 ISP Wayne Longo, or initial W. Longo and T. Johnson at
23 approximately 13:47 on January 1st of 2006.

24 MR. CHAPMAN: Objection, your Honor, to his testimony.

25 THE COURT: Sustained.

1 taken?

2 A. Yes, I was.

3 Q. Are the photographs that you looked at accurate
4 photographs of the driveway of the Cunningham residence and
5 the Blazer at the time that you were there?

6 A. Yes.

7 MR. VERHAREN: Move to admit 62 through 81.

8 MR. CHAPMAN: Moment, please, Your Honor?

9 THE COURT: Certainly.

10 (Defense counsel conferring)

11 MR. CHAPMAN: Your Honor, I thank you for that
12 indulgence. We're presented with, I believe, 19 exhibits at a
13 single time it becomes a little challenging.

14 Judge, we are going to tender an objection as to
15 76, 63, 65, 72, 79 as cumulative.

16 THE COURT: You will have to slow down a little bit, 76,
17 63.

18 MR. CHAPMAN: 65, 72, 79.

19 THE COURT: As cumulative?

20 MR. CHAPMAN: Yes, sir.

21 THE COURT: Can I assume that there is no objection to
22 the balance of the exhibits?

23 MR. CHAPMAN: No, there is no objection to the balance.

24 THE COURT: For the record 62, 64, 66, 67, 68, 69, 70,
25 71, 73, 74, 75, 77, 78, 80 and 81 can be admitted.

1 the tan seat seated between Miss Fisher and the attorney

2 Mr. Chapman.

3 Q. At the time that you got there and he was in the
4 back of that patrol car, was he under arrest?

5 A. Yes.

6 Q. And so you did not interview him?

7 A. I attempted to.

8 MR. CHAPMAN: Judge, may we approach?

9 THE COURT: That would be fine.

10 (Bench conference)

11 THE COURT: Members of the jury, I'll have y
12 for a moment while we discuss a matter on the

13 I'd admonish you not to discuss the case among
14 yourselves nor with others, nor shall you form or express an
15 opinion about it until it is finally submitted to you. With
16 that we will take a few minutes.

17 (WITHOUT THE JURY PRESENT)

18 THE COURT: The jury is clear, Mr. Chapman.

19 Your issue you wish to raise?

20 MR. CHAPMAN: Your Honor, the record will reflect that
21 before the jury the witness was asked if he, the foundation
22 was laid, he approached my client in the back of a patrol car,
23 that the witness identified Mr. Ellington without objection.
24 The next question, and I apologize if I'm paraphrasing, but I
25 believe the next question to be did you interview him. The

1 Perhaps, Mr. Verharen, you and counsel can approach
2 the bench and we can talk about the cumulative nature of these
3 exhibits and maybe save some time.

4 (Bench conference)

5 THE COURT: Record should reflect that I have examined
6 the exhibits. While I would agree with counsel for Mr.
7 Ellington, there is certainly some cumulative nature in the
8 photographs, and perhaps some degree somewhat repetitive. I
9 don't see any particular harm in allowing the multiple
10 photographs be admitted. Appears that some of those
11 cumulative photographs are simply closer images or different
12 angles of essentially the same item to be depicted.

13 So while I'll note the objection here, 63, 65, 72,
14 76 and 79 will likewise be admitted.

15 Continue.

16 MR. VERHAREN: Thank you, Judge.

17 Q. (By Mr. Verharen) At some point was your attention
18 ever drawn to an individual seated in a patrol car?

19 A. Yes.

20 Q. Was he identified for you?

21 A. Yes.

22 Q. As who?

23 A. As Mr. Jonathan Wade Ellington.

24 Q. Is Mr. Ellington here today?

25 A. Yes, he is. Mr. Ellington is the gentleman in

1 witness's answer was I attempted to.

2 Your Honor is familiar through the 915(a) motion, or
3 815(a) motion, transcript of the preliminary hearing, and may
4 remember that Mr. Ellington at least by that time had invoked
5 his right to counsel, or did immediately to Detective Maskell,
6 and that's the attempt to interview.

7 Your Honor, what we are faced with here is a due
8 process violation as outlined by Doyle versus Ohio and its
9 progeny. The gravamen is that Mr. Ellington, as the case
10 stands now, and as he answered to the jury stands now, is
11 going to be punished by an inference that the jury may very
12 well make, and probably will make, he's going to be punished
13 for invoking his rights under the United States Constitution.

14 I attempted to interview him, what kind of an
15 impression does that make in the minds of the jury? We know
16 they can't go farther with this because Mr. Ellington did
17 invoke. Judge, that's a bell that can't be unring. That's
18 certainly Black letter law.

19 We can't explain the attempted to other than by
20 stating that my client invoked his rights under the 5th and
21 6th Amendments to the United States Constitution. What price
22 is he going to have to pay for the invocation? Leaving this
23 jury with the question I attempted to interview him. Judge,
24 that does get into Doyle. In this particular context that
25 does get into Doyle because we cannot tell that jury anything

1 other than he invoked his rights. You can't comment on that.

2 Judge, I'm sorry, we have been through a day and a
3 half of this. John has been deprived of his right to a fair
4 trial. He has been deprived of his right to a trial by jury
5 as well as basic due process. I'd ask the court to declare a
6 mistrial at this point. Certainly counsel for the state and
7 the witness are fully aware of a basic right and basic
8 decision as fundamental as Doyle, ask the court to declare a
9 mistrial at this point because there has occurred in the words
10 of Idaho Criminal Rule 29.1 an error and an illegal defect in
11 these proceedings inside the courtroom which is prejudicial to
12 my client and robs my client of a fair trial.

13 29.1 in this situation, sir, 14th Amendment to the United
14 States Constitution, similar provisions in the Idaho
15 Constitution including Article 1 Section 7 which guarantees to
16 John a right to a fair trial by jury are violated by the
17 conduct of the state. Ask the court to declare this a
18 mistrial, sir, because I have no choice other than to do
19 that, sir.

20 Thank you.

21 THE COURT: Thank you, Mr. Chapman.

22 Mr. Verharen.

23 MR. VERHAREN: Judge, I don't believe I asked the
24 question did you attempt to interview him, I believe I asked a
25 leading question, something along the lines of you didn't

1 interview him, did you. And the reason I asked that leading
2 question was to get around this whole issue.

3 I was fully aware of the fact that he invoked, and
4 in order to get around the whole issue of the interview and
5 the fact that he did invoke, I asked a leading question, you
6 didn't interview him, did you.

7 And I don't think the sergeant's response here came
8 close to an inference here that he invoked his right. He
9 simply said I attempted to.

10 That's where it's been left at this point. I didn't
11 intend to go into it anymore with Sergeant Maskell. I don't
12 think that his response here makes the inference here to the
13 jury that he invoked his right to counsel, I just don't think
14 it's gone that far. And again I asked my question just simply
15 to avoid the whole issue in the first place.

16 I don't think his response here makes inference to
17 the jury that he invoked his right to counsel. I don't think
18 it has gone that far. I asked my question to avoid the whole
19 issue in the first place.

20 MR. CHAPMAN: Excuse me, Your Honor. I think this may be
21 a circumstance where we could see exactly what Mr. Verharen
22 said through the help of Mr. Rush. What I heard was did you
23 interview him. I did not here that leading question to which
24 counsel referred. I heard a direct question that said did you
25 interview him. I heard a direct answer that said I attempted

1 to.

2 THE COURT: That's how I remember it. I don't know if
3 there is a particular distinction because Mr. Verharen's
4 question probably called for a yes or no answer.

5 The answer that would have been most helpful would
6 have been simply no. But I don't remember exactly.

7 Mr. Rush, I don't know if you can look that up and
8 read back the precise question that was tendered to the
9 witness.

10 (The court reporter read the following question and
11 answer: Question: And so you did not interview him?
12 Answer: I attempted to.)

13 THE COURT: Apparently your recollection, Mr. Veharen, is
14 better than mine and Mr. Chapman's. With that distinction,
15 continue, Mr. Chapman.

16 MR. CHAPMAN: Judge, the bell that was rung by that
17 little exchange remains rung. I can't unring that bell. I
18 can't unring that bell. I don't know what the court could do
19 to unring that bell.

20 We are in a legal position, sir, and I have said it
21 before so I'll just say it very briefly once more and sit
22 down. John can't get a fair trial after this without being
23 punished for the invocation of a basic constitutional right.

24 This trial, Judge, I'd propose to you that this is a
25 legal error, a defect in the proceedings brought on by the

1 state. And I can't, in terms of effective representation of
2 Mr. Ellington, allow this jury, this proceeding to go forward.

3 Greatest respect to the court, propose to the court
4 the due process clause of the 14th Amendment as well as its
5 4th, 5th, 6th corresponding analogy provisions of the
6 constitution of the state of Idaho directs this court to
7 declare a mistrial at the instigation of the state at this
8 time, sir thank you.

9 THE COURT: Thank you, Mr. Chapman.

10 Let me take a moment to review the authority and
11 I'll come back and rule on this thing.

12 (Recess)

13 (CONTINUE WITHOUT THE JURY PRESENT)

14 THE COURT: Counsel, I see that everyone is present here.
15 During the break the court took a few moments to review some
16 authority so the court COULD deal with the motion for mistrial
17 that's been presented on behalf of Mr. Ellington. Typically I
18 like to dispatch most of the motions that come in front of the
19 court, however, one of such significant import as the 5th
20 Amendment issues that have been raised here by this objection
21 I think merited some further examination before the court made
22 a determination as to the merits of the motion.

23 The motion has been presented under Rule 29.1, upon
24 motion of the defendant a mistrial may be declared upon motion
25 when there occurs during the trial an error or legal defect in

1 the proceedings, which is applicable here, which is
2 prejudicial to the defendant and deprives the defendant of a
3 fair trial.

4 That's essentially the standard upon which the
5 court has been asked to address. It is a discretionary
6 question for the court to determine whether or not there is
7 a legal defect, first of all, and then, secondly, whether or
8 not that legal defect is of such substance that it would
9 deprive Mr. Ellington of a right to a fair trial.

10 The legal defect that is raised in question here is
11 the offer by the evidence in the state's case in chief that
12 Sergeant Maskell had attempted to interview Mr. Ellington.
13 That's the substance of the evidence that's in front of the
14 court. Whether or not what the further circumstances of that
15 attempt are have certainly not been tendered or advanced to
16 the court.

17 The motion here has been made under the holding of
18 Doyle versus Ohio and its progeny. Doyle and those subsequent
19 cases have made it clear that breaching the implied assurance
20 of the Miranda warning is an affront to the fundamental
21 fairness that the due process clause requires. The point of
22 the Doyle holding is that it is fundamentally unfair to
23 promise an arrested person that his silence will not be used
24 against him and thereafter to breach that promise by using the
25 silence to impeach his trial testimony. It is equally unfair

1 to breach that promise by using silence to overcome a
2 defendant's plea of insanity.

3 In both situations the state gives warnings to
4 protect constitutional rights and implicitly promises that any
5 exercise of those rights will not be penalized. Both such
6 situations the state then seeks to make use of the defendant's
7 exercise of those rights in obtaining his conviction. The
8 implicit promise, the breach and the consequent penalties are
9 identical in both situations.

10 And I cited some pertinent language that came
11 from Waynewright versus Greenfield, which is 474 U.S. 284,
12 a 1986 decision that discusses the holding in Doyle. Doyle
13 has certainly been applied in the state of Idaho in State
14 versus Lopez, as was dutifully pointed out to the court by
15 Mr. Schwartz. That citation which is 114 Idaho 133. I think
16 we had the citation reversed in essence when we were looking
17 at it earlier.

18 But at any rate, a testifying defendant may be
19 impeached with evidence of his or her pre-arrest pre-Miranda
20 silence, however, the defendant's decision to exercise his or
21 her right to remain silent either before or after his or her
22 arrest can not later be used in the state's case in chief for
23 purposes of inferring guilt. The problem with applying the
24 circumstances of this particular case to the holding in Doyle
25 and the holding in Lopez is that in both of those cases the

1 factual situation was somewhat different.

2 In this particular case there was a question, perhaps it
3 was a question that might have been totally avoided to avoid
4 this problem, but it also was a question that I don't think
5 was directly answered, which has aided in creating the
6 problem. But I don't think the issue rises to the same level
7 as the facts in both Lopez, Doyle and some of the other cases
8 where the state has essentially made an effort to impeach
9 testimony of the defendant or to argue in closing arguments
10 that the post-Miranda silence somehow infers guilt. In both
11 of those cases, in fact most of those cases there is a very
12 direct effort on the part of the state to in fact elicit that
13 inference. I cannot agree that the evidence establishes that
14 such is the case that's in front of the court here today.

15 In determining or distinguishing between direct or
16 indirect references the court has examined the decision of
17 Exarhos versus United States. This is a decision which is
18 cited under 135 F.3d 723. In that case the prosecutor's
19 comments in that particular case were not a direct statement
20 or inference of the defendant's silence, but rather an
21 indirect statement. In that case the court held that our
22 precedent is, and the precedent they're referring to, of
23 course, is the Doyle cases, our precedent distinguishes
24 between direct and indirect references to a defendant's
25 silence concluding that indirect references, which I think

1 this court has in this case, are not reversible error per se.

2 Instead the court must assess the impact of the
3 statement in terms of the context in which it was made. A
4 prosecutor's comment will not be considered an impermissible
5 reference to a defendant's silence unless it was the
6 government's manifest intention to do so or it was of such a
7 character that the jury would naturally and necessarily take
8 to be a comment on the defendant's silence.

9 In this particular case I don't think there is a
10 sufficient showing to satisfy the court that it was the
11 government's manifest intention to do that which has occurred
12 here in terms of any inference that could be drawn. The
13 question becomes whether or not it was of such a character
14 that the jury would naturally and necessarily take it to be a
15 comment on the defendant's silence.

16 Mr. Chapman has certainly argued that quite artfully
17 here and the court is certainly mindful that an inference
18 could potentially be drawn from the limited amount of
19 testimony that Sergeant Maskell has offered the court.
20 However there is a very limited amount of testimony that was
21 offered here and there's a number of things that one might be
22 able to speculate as to why this attempt never was
23 accomplished. Some of those have been discussed briefly
24 on the record, however most of those concerns certainly
25 were not concerns that I think would be dealt with under

1 the 5th Amendment.

2 There is certainly no evidence in front of the
3 court, in front of this jury that any Miranda had been
4 presented to Mr. Ellington for the jury's consideration.

5 There is no in-depth explanation at all as to why
6 any attempt to interview Mr. Ellington did not follow through,
7 whether it was because the detective didn't have time, take
8 the time, somebody else didn't do it or was suppose to do it,
9 or what the reasons behind this supposed failed attempt are.

10 I'm not sure that the court can jump to the
11 quantum leap that the jury will simply infer that somehow
12 Mr. Ellington had invoked his right to remain silent and that
13 is why the attempt to conduct an interview was not
14 accomplished.

15 So I think while this is an area of concern that the
16 court should note, I'm not satisfied that it rises to the
17 level that Mr. Ellington cannot receive a fair trial if we
18 proceed even with this evidence that is before the court.

19 I'll leave it to defense counsel to make any request
20 they may feel is appropriate to admonish the jury to disregard
21 this statement. However, it would not be my practice to do
22 that automatically because any automatic reference to
23 testimony has a tendency sometimes simply to emphasize that
24 testimony further. If the defense wishes me to make such a
25 cautionary directive on this issue to the jury, the court

1 would be prepared to do that.

2 However, the court will not be granting a mistrial
3 at this point.

4 Any questions, Mr. Verharen?

5 MR. VERHAREN: No, Judge.

6 THE COURT: Any questions, Mr. Chapman?

7 MR. CHAPMAN: Your Honor, the court has ruled, I
8 appreciate the court's attention to the motion.

9 As to the admonishment to the jury, what could we
10 say, Judge, that would do anything but compound the error?

11 Thank you, Your Honor.

12 THE COURT: I would agree that it should simply not be
13 referred to, we will simply move on.

14 I was not inclined to advise the jury to disregard a
15 statement about attempting to interview the witness. That
16 would be my standard practice absent a motion, and that's what
17 I'll do.

18 With that do you have anything tells before we bring
19 our jury back in?

20 MR. CHAPMAN: Not at this time, Judge. I would ask the
21 court that, well, no. I need to quit at 3:30 sharp is what I
22 was going to say.

23 THE COURT: This is certainly an area that we don't need
24 to broach any further. Sergeant Maskell, I take it you
25 visited with Mr. Verharen about this and understand the

1 significance of this particular issue?

2 SERGEANT MASKELL: I do now.

3 THE COURT: All right.

4 (Concludes without the jury present)

5 (JURY IS PRESENT)

6 THE COURT: Thank you, folks, for your patience, I think
7 we're ready to continue.

8 Mr. Verharen, you can continue your inquiry of
9 Sergeant Maskell.

10 MR. VERHAREN: Thank you, Judge.

11 BRAD MASKELL

12 DIRECT EXAMINATION (cont'd)

13 BY MR. VERHAREN:

14 Q. Sergeant, at some point did you get an opportunity
15 to go to Ron Cunningham's trailer there?

16 A. Yes, I did.

17 Q. About how long after you got there was it that you
18 got to go to his trailer?

19 A. Probably within half an hour.

20 MR. CHAPMAN: Judge, I'm going to object, probably has no
21 place in this courtroom. The objection is lack of personal
22 knowledge. Thank you.

23 THE COURT: Again I think it's simply a term of art, goes
24 to the weight. I don't know that we require precision in our
25 answers and responses. I'll overrule, continue, Mr. Verharen.

1 Q. (By Mr. Verharen) Did you get an opportunity to
2 look inside the trailer?

3 A. Yes, I did.

4 Q. From what viewpoint?

5 A. From the doorway.

6 Q. Can you describe the interior for us, please?

7 MR. CHAPMAN: Objection, relevance, Judge.

8 THE COURT: Do we have some relevance?

9 MR. VERHAREN: I believe there has been references in
10 opening statement to Mr. Ellington having a Zima, and I think
11 this goes to that part of that opening statement.

12 THE COURT: Maybe we should focus, I think your question
13 was broad enough to get into decor and some other items that
14 doesn't strike me as being particularly relevant. So perhaps
15 we can focus on that, even if a little leading would be
16 appropriate. So go ahead.

17 Q. (By Mr. Verharen) Did you see a TV in there?

18 A. I did.

19 Q. Can you describe that TV and where it was located?

20 A. I was in the trailer. As I was -- MR.

21 CHAPMAN: Objection, nonresponsive and relevance, sir.

22 THE COURT: I'll sustain as to nonresponsive. Overrule
23 as to relevance. Continue. Do you remember your question?

24 Q. (By Mr. Verharen) Where was the TV?

25 A. In the middle of the trailer.

1 Q. Did you notice any alcoholic beverage containers
2 inside the trailer?
3 A. I recall that there was some.
4 Q. Can you describe those for us, please?
5 MR. CHAPMAN: Judge, foundation as to relevance. I just
6 don't see what this has to do with the case, Judge. Thank
7 you.
8 THE COURT: I'll overrule. You can answer the question.
9 A. I don't recall the specific brands. I think I do
10 recall seeing at least one Zima bottle in the trailer and some
11 other miscellaneous cans.
12 Q. (By Mr. Verharen) At some point did you take some
13 steps to have that Blazer transported?
14 A. Yes, I did.
15 Q. How did you go about doing that?
16 A. I directed a tow company to be dispatched, and
17 I asked that the Blazer be sealed with evidence tape. I
18 directed the tow company to put the Blazer on a roll bed and
19 then have it transported to the sheriff's department and
20 stored in our secure evidence facility.
21 Q. Before you left the Cunningham residence did you get
22 an opportunity to speak with both Ron and Carol Cunningham?
23 A. I did.
24 Q. After you got done there at the Cunningham residence
25 did you go on down to the actual location of this crime?

1 A. Yes.
2 Q. Was the body of Vonette Larsen there as well?
3 A. Yes.
4 Q. Can you describe generally the positioning of the
5 two vehicles and the body of Mrs. Larsen?
6 MR. CHAPMAN: Judge, this testimony is cumulative unless
7 they have messed around with this crime scene so much that
8 it's different at this time.
9 THE COURT: Briefly I'll let you answer the question.
10 A. There was a white 1996 Honda Accord positioned on
11 the north side of the roadway. It was somewhat off the road
12 facing toward the northeast. Behind that and slightly towards
13 the southeast was a body that was laying in the westbound lane
14 of travel covered with a tarp. Further on into the crime
15 scene there was a maroon colored 1988 Subaru positioned facing
16 westbound in the eastbound lane slightly canted towards the
17 southwest.
18 Q. (By Mr. Verharen) What was it doing in terms of
19 weather when you got there?
20 A. When I got there it was cloudy, starting to have a
21 very, very light sprinkle of rain was beginning as I arrived.
22 Q. In terms of the body of Mrs. Larsen, at some point
23 did you remove the tarp that was covering her body?
24 A. Yes, I did.
25 Q. What was the reason that you did that?

1 A. Yes.
2 MR. CHAPMAN: Objection to that characterization, Your
3 Honor, it's for the jury to decide whether this is a crime or
4 not, not the state.
5 THE COURT: Sustained.
6 Q. (By Mr. Verharen) About what time did you get down
7 to the death scene?
8 A. I think it was approximately ten minutes after 3 I
9 arrived there.
10 Q. When you got to that location at that time, who was
11 there?
12 A. As I recall I approached the scene from the east
13 side.
14 MR. CHAPMAN: Objection, nonresponsive.
15 THE COURT: I believe the question was what time you got
16 there?
17 MR. CHAPMAN: Who was there?
18 THE COURT: Sustained.
19 A. I recall seeing Lieutenant Edmondson there. I saw
20 Lieutenant Dan Mattos there. I saw Deputy Klinkefus. I
21 recall there were two state police officers on the scene.
22 Trooper Robnett and Trooper Kraylich. Captain Wolfinger, I
23 believe, was there. That's all I can recall.
24 Q. (By Mr. Verharen) Was there a Honda car and a
25 Subaru there?

1 A. I wanted to view the decedent and look at the
2 condition of the body and make note of the injuries.
3 Q. As a investigator of major crimes is it your common
4 practice to look at someone who has died without anything
5 covering them?
6 A. Absolutely.
7 Q. Why is that?
8 A. Well, you have to look at the death scene to be able
9 to interpret some of the injuries to understand what took
10 place there and what happened to the victim. You want to take
11 a look at the body positioning, various physiological aspects
12 of the body that have to do with the death process, whether or
13 not the body has been moved, what the bloodstain patterns are,
14 whether or not those are consistent with what your information
15 is pertaining to what had occurred.
16 Q. Is it possible for a fact finder to get an accurate
17 idea of what happened to somebody without looking at their
18 body at the location of the death scene?
19 A. No.
20 Q. Have you had any training in terms of blood smears?
21 A. I have.
22 Q. Can you describe that for us, please?
23 A. I have attended specific training with regards to
24 bloodstain pattern analysis as well as several other blocks of
25 training within various homicide courses that I have attended

1 that detail information about characteristics of bloodstain.

2 Q. In terms of your experience have you run into
3 bloodstain or blood smears on the job?

4 A. I have.

5 Q. Many times?

6 A. Yes.

7 Q. So based on your training and experience are you
8 comfortable in assessing bloodstain or blood smear evidence at
9 a crime scene?

10 A. I am.

11 Q. At some point when you got to examine the body of
12 Mrs. Larsen did you notice any blood smears or bloodstaining
13 in relationship to her body?

14 A. I did.

15 MR. VERHAREN: Could the witness, please, be provided
16 with Plaintiff's Exhibit 35?

17 Q. (By Mr. Verharen) Detective, are you familiar with
18 Plaintiff's Exhibit 35?

19 A. I am.

20 Q. What do you recognize that to be?

21 A. This is one of the images that were --

22 MR. CHAPMAN: Your Honor, I'm going to object at this
23 time, that's not admitted. To testify to its contents at this
24 time, well, it's an end run around the court's ruling.

25 THE COURT: I would certainly sustain the objection,

1 THE COURT: I think it would have been improper question
2 if it was asked if it had nothing to do with the
3 investigation, so I'll let you answer the question.

4 Go ahead.

5 A. Yes.

6 Q. (By Mr. Verharen) What's that?

7 A. The red shirt.

8 Q. Why is that significant in your investigation?

9 A. It's consistent with red material that was recovered
10 by the state police forensic unit.

11 MR. CHAPMAN: Objection, Your Honor, foundation.

12 THE COURT: Sustained.

13 MR. CHAPMAN: Move to strike and admonish, sir.

14 THE COURT: The court will go ahead and strike the
15 testimony with reference to what was determined by the state
16 forensic laboratory. That evidence is not in front of the
17 jury at this point in time, so that will be disregarded.

18 Thank you.

19 Q. Are you familiar with the Idaho State Police doing
20 an investigation that centered on the underside of that
21 Blazer?

22 A. Yes, I am.

23 Q. And are you familiar with various pieces of evidence
24 that were found on the underside of the Blazer?

25 A. Yes.

1 we're not going to testify as to everything depicted on there,
2 but just a general statement of what you're looking at as far
3 as the photograph I think is acceptable. I don't want you to
4 describe its content in detail, but just what you're generally
5 looking at.

6 A. It's an image taken from the eastbound lane.

7 MR. CHAPMAN: Objection, foundation.

8 THE COURT: I'll overrule, I'll let it stand. Continue.

9 Q. (By Mr. Verharen) Does it depict the body of
10 Mrs. Larsen uncovered there in the road?

11 A. It does.

12 Q. Is the position of her body in the same position
13 that you found it when you got there?

14 A. Yes.

15 Q. Does the position of the body in terms of the
16 relationship to any blood around the body tell you anything
17 about this particular crime scene?

18 A. It does.

19 Q. Let me ask another question here. In terms of the
20 clothing that Mrs. Larsen is wearing, is there anything
21 specific about her clothing that is important in this
22 particular investigation?

23 MR. CHAPMAN: Objection to the nature of the question.
24 Important to this investigation. That's an improper question,
25 sir.

1 Q. And your familiarity with that evidence underneath
2 the Blazer, is that why the clothing that Ms. Larsen is
3 wearing was important to your investigation?

4 MR. CHAPMAN: Your Honor, I object to the leading.

5 THE COURT: Sustained.

6 MR. CHAPMAN: I'd ask the court to strike and admonish.

7 THE COURT: There hasn't been an answer, there's nothing
8 to strike.

9 Q. (By Mr. Verharen) Looking at Plaintiff's Exhibit
10 35, what does that tell you, the blood trail itself, in terms
11 of its relationship to any tire marks there as well as the
12 body of Mrs. Larsen?

13 MR. CHAPMAN: Your Honor, again I object. The question
14 assumes facts not in evidence, and again it's an end run
15 around this court's previous ruling.

16 THE COURT: The court's previous ruling was based upon
17 the graphic nature of the photographs, and I've ruled on
18 that. The reason I ruled on that in the fashion I did is
19 because the state certainly had a less graphic manner to
20 establish what evidence they felt was critical, and I think
21 that's where we are headed here. So I'm going to overrule and
22 allow you to continue.

23 Q. (By Mr. Verharen) Do you remember my question?

24 A. Would you restate it?

25 Q. I'll give it a shot, I'm not sure I can remember

1 it. Let me ask you this one.
 2 Have you seen the other photographs that have been
 3 admitted that show the body of Mrs. Larsen covered by a tarp?
 4 A. Yes, I have.
 5 Q. Why is Plaintiff's Exhibit 35 different than the
 6 photographs showing her body covered by a tarp in terms of
 7 that blood smear?
 8 MR. CHAPMAN: Objection, asked and answered.
 9 THE COURT: Overruled, you can answer the question.
 10 A. The main reason is that the body is uncovered in
 11 this picture and you're able to see the trail of blood and the
 12 directionality of the blood flow, and also the smear pattern
 13 on the road and how it relates to the position of the victim
 14 in the roadway.
 15 Q. (By Mr. Verharen) And is there anything about the
 16 blood smear on the road in relationship to both the body of
 17 Mrs. Larsen as well as the tracks that are visible in that
 18 photograph?
 19 MR. CHAPMAN: Again, Your Honor, he's being asked to
 20 testify to something that's not in evidence.
 21 THE COURT: I believe he testified that he was at the
 22 scene and he made these observations, so I'll let you go ahead
 23 and answer the question.
 24 A. The blood smear pattern is positioned in line with
 25 the marks in the roadway that indicate the path of a vehicle.

1 cross-examination, but I think I'll allow it to stand,
 2 continue.
 3 Q. (By Mr. Verharen) Did you note where the hair was
 4 located in relationship to her body?
 5 A. That hair was in that smear pattern at the west end
 6 of that smear pattern approximately a foot to the west of her
 7 right heel.
 8 Q. Did you take that hair and book it into evidence?
 9 A. I directed that it be booked in.
 10 Q. You had a good look at it before it was taken from
 11 the scene and put into evidence?
 12 A. I did.
 13 Q. Yes?
 14 A. Yes.
 15 Q. Do you have that with you today?
 16 A. I do.
 17 Q. Has that been marked with an exhibit?
 18 A. Yes.
 19 Q. So you have in front of you what has been marked as
 20 Plaintiff's Exhibit 162?
 21 A. Yes, I do.
 22 Q. And you recognize 162?
 23 A. Yes.
 24 Q. What is it?
 25 A. It is the clump of hair that was removed from that

1 MR. VERHAREN: Move to admit Plaintiff's 35.
 2 MR. CHAPMAN: Could I see what it is, Judge?
 3 THE COURT: That's the photograph I think you reviewed
 4 earlier.
 5 MR. CHAPMAN: May I see it?
 6 THE COURT: Absolutely.
 7 Do you have an objection, Mr. Chapman?
 8 MR. CHAPMAN: I do, sir.
 9 THE COURT: Sustained. Continue, Mr. Verharen.
 10 Q. (By Mr. Verharen) At some point, Detective, did you
 11 notice any hair by the body of Mrs. Larsen?
 12 A. I did.
 13 Q. Can you describe that for us, please?
 14 MR. CHAPMAN: Objection, move to strike that, foundation.
 15 THE COURT: Overruled.
 16 A. There was a small clump of hair that was embedded
 17 into the blood smear stain pattern that connected to the right
 18 foot of the body.
 19 MR. CHAPMAN: Again, Your Honor, objection to
 20 foundation. Unless we have had a scientific analysis of this,
 21 we don't know that it's hair. And I'd move that the court
 22 strike and admonish, please.
 23 THE COURT: I don't believe there has been any scientific
 24 offer tendered by this witness. Certainly his observations
 25 may appear to be natural in nature and may be subject to

1 smear pattern.
 2 MR. CHAPMAN: Judge, again, may my objection to that
 3 characterization be continuing? The court has ruled.
 4 THE COURT: That will be a continuing objection. I think
 5 it's certainly clear there has been no scientific testing done
 6 on any hair. Simply this witness's opinion that that's what
 7 the substance was. Continue.
 8 Q. (By Mr. Verharen) Is Plaintiff's Exhibit 162 in the
 9 same or substantially the same condition now as it was when it
 10 was laying there on the road next to the body of Mrs. Larsen?
 11 A. In the same condition?
 12 Q. Same or substantially same condition?
 13 A. Yes.
 14 MR. VERHAREN: Can the witness, please, be shown
 15 Plaintiff's Exhibit 29?
 16 Q. (By Mr. Verharen) Detective, you have in front of
 17 you what's been marked as Plaintiff's Exhibit 29. Can you
 18 just briefly describe if you recognize that for us, please?
 19 A. I do.
 20 Q. What's that a photograph of?
 21 A. This is a photograph of the body of Vonette Larsen
 22 taken from the south side towards the north and it depicts --
 23 MR. CHAPMAN: Again objection, Your Honor. We could
 24 either admit the photograph, have the witness testify about
 25 it, one or the other. This is again trying to get around this

1 court's ruling.

2 THE COURT: Are you asking to have the photograph
3 admitted at this point?

4 MR. CHAPMAN: No, sir, I'm asking you to exclude the
5 testimony in this answer.

6 THE COURT: Again I excluded the photograph because of
7 its graphic nature and because I felt the state could
8 establish that with less graphic means. And if you want to
9 lay the foundation that the officer had observed that which he
10 is now looking at, then I think you can go ahead and proceed,
11 Mr. Verharen.

12 MR. VERHAREN: Thank you, Judge.

13 Q. (By Mr. Verharen) Does Plaintiff's Exhibit 29
14 accurately depict where the hair was in relationship to
15 Ms. Larsen's body when you observed it there?

16 A. Yes, it does.

17 Q. Now, in terms of the other photographs that have
18 been admitted that show Mrs. Larsen covered by a tarp, is it
19 possible to get an accurate determination of where that hair
20 is in relationship to her body because the tarp is covering
21 her body?

22 A. No.

23 MR. CHAPMAN: Judge, may I ask a question in aid? Well,
24 may I?

25 THE COURT: Go ahead.

1 that you have in front of you marked as 162?

2 A. Yes.

3 MR. VERHAREN: Move to admit 162 and 29.

4 THE COURT: Do you have an objection, Mr. Chapman?

5 MR. CHAPMAN: Yes, I object, sir.

6 THE COURT: Sustained.

7 Q. (By Mr. Verharen) Did you end up taking some more
8 photographs when you were there at the scene?

9 A. I did.

10 Q. What was the reason for that?

11 A. I just wanted to get additional photographs of the
12 scene the way it looked when I arrived and also document some
13 of the accident reconstruction that was taking place there at
14 the time that I arrived.

15 Q. What time do you think you started taking these
16 photographs?

17 A. Probably in the neighborhood of about 3:30.

18 Q. What was going on when you were taking these
19 photographs?

20 A. There was two state police officers that were
21 involved in examining the scene and conducting their analysis
22 of the evidence at the scene.

23 Q. Let me show you what has been marked as Plaintiff's
24 Exhibit 47, do you recognize that?

25 A. I do.

1 VOIR DIRE EXAMINATION

2 BY MR. CHAPMAN:

3 Q. Sergeant, you arrived at the scene when?

4 A. It was about 3:10.

5 Q. Can you testify under oath as to your own personal
6 knowledge, sir, that this scene remained undisturbed from the
7 time this incident happened until the time that you arrived?

8 A. No.

9 MR. CHAPMAN: Your Honor, I move to object, I move to
10 exclude this entire line of testimony on the basis that this
11 witness cannot offer foundational testimony from his own
12 personal knowledge as is required by our rules, sir. Where
13 this was or that was, he has no knowledge of.

14 THE COURT: The witness is testifying to that what he
15 observed at a particular time. All the witnesses so far have
16 acknowledged that they can't testify that this is precisely
17 how things appeared at the time of the alleged incident. So
18 the witness's testimony can only pertain to that the witness
19 observed at that particular point in time. So I think the
20 officer can continue with his testimony, overruled. A yes?

21 Q. (By Mr. Verharen) Was that a yes? I don't even
22 remember what I asked you. Do you recall what I asked you?

23 Let's just do it this way. In terms of Plaintiff's
24 Exhibit 29, is that an accurate photograph of, this is of the
25 hair next to Ms. Larsen's body there that you collected and

1 Q. What's that a photograph of?

2 A. This is a photograph that I took of the maroon
3 Subaru positioned in the intersection.

4 Q. Does it depict anything in terms of the ongoing
5 reconstruction that was taking place?

6 A. Yes.

7 Q. What's that?

8 A. The orange paint markings in the roadway that were
9 placed there by the state police doing their reconstruction.

10 Q. How about 48, what that a photograph of?

11 A. This is another angle showing the positioning of the
12 maroon Subaru as it relates to the intersection and additional
13 markings in the roadway that trace vehicle path.

14 Q. How about 49?

15 A. This is another view of the Subaru showing the
16 reconstruction efforts and markings in the roadway south of
17 the Subaru.

18 Q. 50?

19 A. This is another view of the Subaru from a different
20 angle. This depicts the front left corner of the Subaru and
21 some of the damage also, some of the reconstruction markings.

22 Q. How about 51?

23 A. This is a view of the intersection specific to the
24 south side of the Subaru excluding the Subaru and including
25 the markings on the roadway made by the state police.

1 Q. How about 52?

2 A. This will be a further back in a different angle
3 face on view from the back of intersection viewing the front
4 of the Subaru and also showing the markings in the roadway
5 that the state police were doing.

6 Q. How about 53?

7 A. This is a view of Scarcello Road that I took from
8 the west side viewing towards the east, again showing some of
9 the reconstruction effort that was taking place.

10 Q. 54?

11 A. Another view a little ways to the west of the Honda
12 showing the driver's side of the Honda. Some of the debris
13 that was noted in the road. Also some of the orange paint
14 markings in the roadway that were made by the state police.

15 Q. 55?

16 A. This is a closer view of the 1996 Honda positioned
17 along the north side of the roadway taking into consideration
18 some of the vehicle marks and debris that were lining up to
19 the Honda.

20 Q. 56?

21 A. This is a view from the opposite side of the Honda
22 car, the 1996 Honda, north side of the roadway showing the
23 passenger side door open, and also in the forward you can see
24 two witness statements that were hanging out of the doorway.

25 Q. Of the Honda?

1 A. Yes.

2 Q. How about 57?

3 A. This is a closer view, gives a little more detail
4 view of the Honda along the passenger side. Shows the open
5 door, the deployed airbag system, the witness statements that
6 were partially in the vehicle. Also the furrowing into the
7 roadway of both the tires on the right side of the vehicle.

8 Q. How about 58?

9 A. 58 is a clear close-up photo of specifically the two
10 witness statements that were positioned partially in the
11 vehicle hanging out, both of which I recognized as Kootenai
12 County Sheriff witness statements.

13 Q. 59?

14 A. 59 is a view of the passenger side of the Subaru. I
15 had walked out to the front to take into account the damage on
16 the front of the Subaru as well as the furrowing into the dirt
17 the Subaru had made after having been pushed.

18 Q. 60?

19 A. This is a close-up view of the front of the Subaru,
20 the front passenger side corner, and a close-up view showing
21 the vehicle's tires being furrowed into the dirt.

22 Q. 61?

23 A. 61 is a close-up view of the upper chest and head of
24 Ms. Vonette Larsen. This image depicts some of the pattern
25 injuries that I saw there at the scene.

1 Q. Why did you take that photograph?

2 A. I took the photograph because of the pattern
3 injuries that were evident on the body so that they could be
4 compared to the scene.

5 Q. These photographs that you have just identified,
6 47 through 61, you took them all around the same time period?

7 A. Yes.

8 Q. And that was from when to when?

9 A. Probably 3:30 to 3:45.

10 Q. Those are all accurate photographs of various things
11 they depict at that time?

12 A. Right.

13 MR. VERHAREN: Move to admit 47 through 61.

14 MR. CHAPMAN: May I be afforded the courtesy of seeing
15 what he's talking about?

16 THE COURT: I know you have received some. I think
17 there's still extra ones.

18 MR. CHAPMAN: Judge, I think the court needs to see
19 these. I do not object to any of them. There are five
20 million color glossy photographs. I do object to 61. If the
21 court wishes to hear the rationale for that, I'd be very glad
22 to tender it.

23 THE COURT: I don't know that that's necessary
24 consistent with our previous discussion. Sustain the
25 objection to exhibit 61, at least at this point in time.

1 MR. CHAPMAN: Judge, the jury is able to see that, so,
2 please.

3 THE COURT: I don't know if they were or not. The rest
4 of the exhibits can be admitted. That would be exhibits 47
5 through 60. Continue.

6 MR. VERHAREN: Thank you, Judge.

7 Q. (By Mr. Verharen) Sergeant, did you obtain those
8 witness statements that are visible in a couple of those
9 photographs?

10 A. I did.

11 Q. Do you have those with you now?

12 A. I do.

13 Q. One is marked as Plaintiff's exhibit 150?

14 A. Yes.

15 Q. And the other is marked as Plaintiff's exhibit 153?

16 A. That's correct.

17 Q. Are they in the same or substantially same condition
18 now as they were when you saw them laying partially outside of
19 the Honda when you got to the crime scene?

20 A. Yes.

21 Q. After the reconstruction was complete what efforts
22 did you take to transport both the Subaru and the Honda to
23 another location?

24 MR. CHAPMAN: Objection to the nature of the question, it
25 assumes facts not in evidence.

1 THE COURT: Sustained.
 2 Q. (By Mr. Verharen) At some point did you take steps
 3 to transport the Subaru and the Honda to a different location?
 4 A. I directed that the Honda and the Subaru --
 5 MR. CHAPMAN: Objection, nonresponsive, that's a yes or
 6 no question.
 7 A. Yes.
 8 THE COURT: Thank you.
 9 Q. (By Mr. Verharen) Why did you do that?
 10 A. I wanted to preserve both the vehicles for analysis.
 11 Q. About what time did that occur?
 12 A. I wasn't present at the scene when both vehicles
 13 were removed.
 14 MR. CHAPMAN: Objection, not responsive. Question was
 15 what time did that occur.
 16 THE COURT: Sustained.
 17 Q. (By Mr. Verharen) About what time did you leave the
 18 scene?
 19 A. About 5 p.m..
 20 Q. And were those vehicles still there?
 21 A. Yes.
 22 Q. Describe the steps you took to have them transported
 23 to a different location, please?
 24 A. I met with the ISP troopers that were doing the
 25 analysis of the scene and instructed them to have the vehicles

1 A. I had been notified early on in the investigation
 2 that during the vehicle processing --
 3 MR. CHAPMAN: Objection to the answer, Judge. Narrative
 4 testimony, nonresponsive.
 5 THE COURT: I'm not sure if it appears to be narrative at
 6 this point. If it becomes so, we'll certainly cut him off.
 7 Continue.
 8 A. For comparison to palm prints that were located on
 9 the hood of the Blazer.
 10 MR. CHAPMAN: Objection, foundation.
 11 THE COURT: Overruled.
 12 Q. (By Mr. Verharen) Did you go about taking palm
 13 print and fingerprints of Mrs. Larsen?
 14 A. I did.
 15 Q. What did you do with those?
 16 A. I provided those to the state police.
 17 Q. At some point did you get notification that the
 18 state police wanted another set of fingerprints taken from
 19 Mrs. Larsen?
 20 A. Yes.
 21 Q. Tell us, describe what happened in that regard,
 22 please?
 23 A. By that point in the investigation there was -- I
 24 made a decision not to submit any further prints to the lab.
 25 Q. Can you describe, please, why you made that

1 sealed and brought to our evidence impound yard.
 2 Q. In terms of the body of Mrs. Larsen, what steps did
 3 you take to have her transported from there?
 4 A. I directed the funeral home to place her into a body
 5 bag and seal the body bag with a tag.
 6 Q. In the days that followed did you undertake an
 7 investigation into this matter?
 8 A. Yes.
 9 Q. Did you speak to any individuals?
 10 A. Yes.
 11 Q. Approximately how many?
 12 A. I don't recall the exact number, approximately six
 13 or seven.
 14 Q. At some point did you take some palm and
 15 fingerprints of Vonette Larsen?
 16 A. I did.
 17 Q. Where did you do that?
 18 MR. CHAPMAN: Objection, Judge, the nature of the
 19 question. I'll withdraw that right now.
 20 THE COURT: Thank you. Continue.
 21 Q. (By Mr. Verharen) Where did you do that?
 22 A. Why did I take the prints?
 23 Q. Yes.
 24 A. At the funeral home.
 25 Q. What was the reason for doing that?

1 decision?
 2 A. Because there was not an issue at hand in the
 3 investigation in identifying whether or not Mrs. Larsen had
 4 contacted that Blazer.
 5 Q. Do you have what's been marked as 161 in front of
 6 you?
 7 A. Yes.
 8 Q. That's a two page document stapled together?
 9 A. Yes, it is.
 10 Q. And is that the lab report indicating the lack of
 11 sufficient ridge detail --
 12 MR. CHAPMAN: Judge, objection to the leading.
 13 THE COURT: Sustained.
 14 MR. VERHAREN: Judge, there is a stipulation as to entry
 15 of this exhibit, so I'm not quite sure why counsel is
 16 objecting to it.
 17 THE COURT: I certainly wasn't aware of any such
 18 stipulation, if there is.
 19 MR. CHAPMAN: Neither was I, may I have a moment,
 20 please?
 21 THE COURT: That would be fair. Why don't you take the
 22 exhibit and visit with co-counsel, please, would be the best
 23 way to handle it.
 24 MR. CHAPMAN: Your Honor, it's apparent that we did agree
 25 to its admission. I apologize to counsel and to the court.

1 We did not agree, however, that it was going to get read to
 2 the jury and testified to.
 3 THE COURT: Can we have the exhibit admitted at this
 4 point?
 5 MR. VERHAREN: That would be a good idea.
 6 THE COURT: What's the number on the exhibit?
 7 WITNESS SERGEANT MASKELL: 161.
 8 THE COURT: 161, any objection to the admission of 161?
 9 MR. VERHAREN: No, Judge, I'm offering it.
 10 THE COURT: Any objection?
 11 MR. CHAPMAN: As I said, counsel is correct.
 12 THE COURT: 161 can be admitted. Why don't you hand that
 13 back to the clerk. We will get it marked admitted and hand it
 14 back and see if you have some questions on that.
 15 MR. VERHAREN: Thank you, Judge.
 16 Q. (By Mr. Verharen) What is 161, Sergeant?
 17 A. 161 is a two page, in fact it's a two page report
 18 attached --
 19 MR. CHAPMAN: Your Honor, again object. That's been
 20 admitted. If we want to spend another half an hour talking
 21 about it because the jury is going to get to see it because we
 22 did agree to admit it, we're wasting time here, sir, this is
 23 showboating, this isn't evidence.
 24 THE COURT: The exhibit has been admitted and certainly
 25 speaks for itself. If you have question on the exhibit, I

1 Q. What did you do with that digital recording?
 2 A. I submitted it for analysis.
 3 Q. To who?
 4 A. To an organization called REMIN, the Rocky Mountain
 5 Information Network.
 6 Q. What is REMIN?
 7 A. REMIN is an organization, it's an analytical support
 8 organization for law enforcement that provides analytical and
 9 various other types of services to law enforcement.
 10 Q. What specific instructions did you give that
 11 recording to REMIN with?
 12 MR. CHAPMAN: Objection, Your Honor, relevance.
 13 THE COURT: Overruled.
 14 A. I wanted to determine whether or not the sounds of
 15 gunfire were audible on the 911 tape and whether or not, where
 16 they were at, if they were audio, at what points they would be
 17 on the tape, as well as how many are audible.
 18 Q. (By Mr. Verharen) I think you also have in front of
 19 you what has been marked as Plaintiff's Exhibit 164, do you
 20 recognize that?
 21 A. I don't believe I have 164.
 22 Q. Paint chip?
 23 MR. CHAPMAN: Objection to the leading, Judge.
 24 THE COURT: It's foundation.
 25 A. I do have 164.

1 think that's fair, but we certainly are not going to read or
 2 recite all the information contained in the document. But I'll
 3 let you continue, Mr. Verharen.
 4 MR. VERHAREN: Thank you.
 5 Q. (By Mr. Verharen) Sergeant, what is Plaintiff's
 6 Exhibit 161?
 7 A. It's a lab report from the state police.
 8 Q. In terms of your further investigative efforts, at
 9 some point did you contact the 911 center?
 10 A. I did.
 11 Q. What was the reason for that?
 12 A. I wanted to determine whether or not there was
 13 available to me a better quality of the audio recording of the
 14 911 call that is involved in this matter.
 15 Q. And so what did you do to try and obtain a better
 16 quality copy?
 17 A. I contacted the 911 supervisor who did confirm in
 18 fact they could provide me a better quality.
 19 MR. CHAPMAN: Objection, hearsay.
 20 THE COURT: Sustained.
 21 Q. (By Mr. Verharen) At some point did you get a better
 22 quality 911 recording?
 23 A. I did.
 24 Q. What type of recording is that?
 25 A. A digital recording.

1 THE COURT: Overruled.
 2 Q. (By Mr. Verharen) What do you recognize 164 to be?
 3 A. 164 is the white paint chip collected from the
 4 Blazer.
 5 Q. At the Cunningham residence?
 6 A. That's correct.
 7 Q. You had an opportunity to view that paint chip
 8 before it was collected?
 9 A. I did.
 10 Q. Is that paint chip in the same or substantially same
 11 condition now as it was when it was on the bumper of that
 12 Blazer?
 13 A. Yes.
 14 MR. VERHAREN: Move to admit 164.
 15 THE COURT: If counsel wants to examine the exhibit, you
 16 can do so.
 17 MR. CHAPMAN: Be nice if I knew what I was talking about,
 18 Judge.
 19 May I inquire in aid, sir?
 20 THE COURT: Certainly.
 21 VOIR DIRE EXAMINATION
 22 BY MR. CHAPMAN:
 23 Q. Sergeant, have you had an analysis of 164 performed?
 24 A. No.
 25 Q. You don't know the chemical composition of anything

1 in that envelope?

2 A. No.

3 Q. You don't know whether that's paint or plastic or
4 what it is on a scientific basis?

5 A. No.

6 MR. CHAPMAN: Thank you, sir. Your Honor, I'd object,
7 we don't know what that is.

8 THE COURT: I'll overrule. I think it certainly goes to
9 the weight of the evidence, but I don't think it affects its
10 admissibility. There's some other evidence that I think would
11 support it being admitted. So, continue.

12 MR. VERHAREN: Judge, I would like to show the jury these
13 photographs at this time. How late did you intend to run
14 today?

15 THE COURT: I have a little bit of leeway, do you want to
16 go ahead and publish the photographs that were just admitted?

17 MR. VERHAREN: That's what I intended to do, yes.

18 THE COURT: How were we going to do that? I know the
19 mechanical device wasn't working as well as we hoped, you said
20 you were going to publish them.

21 MR. VERHAREN: I was simply going to have Sergeant
22 Maskell get up and approach the jury with the photographs.

23 THE COURT: In the same fashion we did earlier with
24 Sergeant Carrington?

25 MR. VERHAREN: Yes, sir. Approach the jury with the

1 photographs.

2 MR. CHAPMAN: Judge, I'm required in another courtroom at
3 3:30, I made commitments with the understanding that this
4 court would be adjourning at 3:30.

5 THE COURT: One of my larger matters this afternoon had
6 been vacated, and so I have a little bit of leeway.

7 Unfortunately we all have business at the same time around
8 here with the amount of work we have to do. So maybe this
9 would be a good place to break for the day and be back at 8:30
10 in the morning. At that point in time we'll go ahead and take
11 up the publishing of the evidence in the fashion you have
12 offered.

13 With that, again, members of the jury, I think we
14 are done for the day. See everyone back here tomorrow morning
15 at 8:30 and admonish you not to discuss the case among
16 yourselves nor with others, nor form or express an opinion
17 about it until it is finally submitted to you.

18 With that we will see you folks tomorrow morning
19 at 8:30.

20 (Concludes proceedings on August 23, 2006)

21

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23

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25

1 AUGUST 24, 2006, 8:30 O'CLOCK A.M.

2 (WITHOUT THE JURY PRESENT)

3 THE COURT: I've been advised that everyone is present.

4 Looks like everyone is ready to get under way here.

5 Is the state ready to continue?

6 MR. VERHAREN: Yes, sir, I have a couple of things I'd
7 like to take up.

8 THE COURT: Go right ahead.

9 MR. VERHAREN: Thank you, Judge. Because of the lighting
10 in here we can't get this Power Point to work, and so for
11 Plaintiff's Exhibit number 2 at this time I'd move to withdraw
12 that particular exhibit and then simply enter this one into
13 evidence.

14 MR. CHAPMAN: That's fine.

15 THE COURT: Have you marked that?

16 MR. VERHAREN: I have.

17 THE COURT: That would be exhibit number?

18 MR. VERHAREN: 2.

19 THE COURT: So you want to just replace exhibit 2?

20 MR. VERHAREN: Just replace it.

21 THE COURT: Remove the existing exhibit 2, why don't you
22 hand that to me, maybe I can use that as a bench copy, and we
23 will admit the larger exhibit. I know I had a trial once that
24 instead of using the screen, we used the wall, and it actually
25 worked quite well.

1 Perhaps you may might want to take an approach at that.

2 MR. VERHAREN: I appreciate that, Judge.

3 THE COURT: It would seem to me if we had a photograph
4 that depicted the feet, the center line and hair, that
5 wouldn't meet the concerns that I had earlier with the graphic
6 nature that was depicted otherwise. But that was the grounds
7 that that exhibit, that would exhibit 29, was rejected.

8 That would not have been the basis that the court
9 rejected 162. Maybe, Mr. Chapman, I looked at the notes and
10 I'm not really sure what the court's basis for that objection
11 was. The item that is reflected in 162 appears to be what the
12 officer felt was hair along the roadway. It that was
13 rejected, it probably would have been on a foundational basis,
14 but I can't tell from my notes and I can't recall from your
15 objection, Mr. Chapman, what the basis of the objection was to
16 exhibit 162. Frankly I didn't even remember that it was
17 offered.

18 MR. CHAPMAN: Judge, for one thing there was no, on a
19 foundational basis there was no scientific testing to
20 establish that whatever is in there actually was hair or skin
21 or blood or whatever it was purported to be. Therefore the
22 foundation is lacking. We are lacking in chain of custody.
23 We are also lacking, Judge, rather than putting specific
24 artifacts of the deceased into evidence there is other ways to
25 do that. As the court just suggested, photograph. As the

1 MR. VERHAREN: The details on these photographs I think
2 would be obscured on the wall.

3 THE COURT: All right, fair enough.

4 MR. VERHAREN: Judge, the other thing I wanted to address
5 is it occurred to me that I offered 29 and 162 at the same
6 time. You sustained an objection, and I'm not sure if your
7 legal basis to both of those exhibits was the same. But at
8 any rate at this time I'm going to again offer 162 rather than
9 29 and 162 together.

10 THE COURT: Let me see 29 and 162, because I think I had
11 a little confusion on at least 29.

12 THE CLERK: There was objection of 162 and 29, and you
13 sustained the objection.

14 THE COURT: If my ruling was the same on both exhibits, I
15 think there was probably some lack of clarity on my part
16 because I don't think that the court's assessment of these
17 exhibits is the same. I think exhibit 29, basically the court
18 was concerned about the graphic nature of the photograph and I
19 felt that establishing what the photograph depicts could be
20 done in some other method.

21 Looking at this photograph and understanding the
22 state's position, I suspect there might be some way for you to
23 crop everything but the feet and center line and then smudges
24 in the roadway off and perhaps this photograph might then be
25 able to be admitted without the concerns that I had earlier.

1 court just suggested everything. To put an actual artifact of
2 the deceased into evidence is certainly extremely more
3 prejudicial than probative of any point of material issue in
4 this case.

5 The location of what they believe to be hair may be
6 important to the state's case. I could probably see that.
7 Putting the actual hair into evidence, Judge, accomplishes no
8 purpose other than to inflame the jury. There is no legal
9 justification to admit that. It's lacking foundation. The
10 court has ruled once on the evidence. There is just no point,
11 Judge, we don't know its hair. We don't know its human hair.
12 We don't know whose human hair it is. So the objection, sir,
13 summarized, is 403 and foundation.

14 THE COURT: Thank you, Mr. Chapman. I guess to answer
15 your question then, Mr. Verharen, the basis for the court
16 sustaining the objection would not have been the same reason,
17 and I just can't, I apologize, I simply can't remember what
18 the basis for sustaining any objection on 162. I'm not
19 satisfied, despite counsel's argument here, that offering
20 actual artifact of an item of hair, if that's what this turns
21 out to be, is so inflammatory that that would be unduly
22 prejudicial. I'm not satisfied that that exceeds that
23 particular test.

24 So perhaps you can proceed on the basis that the
25 objection to this exhibit was simply a foundational

1 objection. I don't know that I can answer your question any
2 better.

3 MR. VERHAREN: I think you did, Judge.

4 THE COURT: I frankly think I probably grouped this with
5 the other exhibit and just simply ruled on the graphic
6 concerns that I've already articulated.

7 MR. VERHAREN: Thank you, Judge.

8 THE COURT: I'm not satisfied that that really is the
9 basis to have rejected 162. So at this point I think it's
10 simply a foundational issue that you can proceed with
11 further. Any other questions that you have?

12 MR. VERHAREN: No, sir.

13 THE COURT: Thank you for that clarification.

14 Anything that Mr. Ellington has at this point before
15 we bring our jury in?

16 MR. CHAPMAN: Your Honor, I don't read the press, but
17 other members of my team apparently do, and apparently there
18 was some rather inflammatory information articles appearing in
19 the newspapers this morning. I know the court has admonished,
20 in fact they were going into the exact reasons for the motion
21 for mistrial yesterday. The exact, and some other things.

22 THE COURT: When you make reference to the press, are we
23 using that as a general term? I did read the Spokesman Review
24 article.

25 MR. CHAPMAN: I think it was the Spokesman, I'm told. As

1 I said, I don't read newspapers.

2 THE COURT: As aside I thought they did an excellent job
3 of taking the photo of your client coming from the jail hold
4 without depicting any type of an in-custody situation,
5 appeared to be a good photograph to me.

6 MR. CHAPMAN: Thank you, sir.

7 THE COURT: That's aside, I know that's not a concern.

8 MR. CHAPMAN: Yes. I'm wondering, sir, we are wondering
9 if perhaps the jury should be polled. I know they have been
10 instructed. I don't know how far in the real world those
11 instructions go, but the whole business about our Doyle motion
12 yesterday and the reasons therefore was set forth in the
13 press. I don't know, perhaps the court could inquire of the
14 jury to see if anybody is going to tell you whether they did
15 or not.

16 THE COURT: Well, I think I had thought about this matter
17 earlier before the motion was brought. I know we are probably
18 going to have an article in the paper every day and maybe
19 something on the news every evening from some of the local
20 affiliates, and the court, of course, has admonished the
21 jurors. I don't know that I want to engage in a practice
22 where I voir dire the jurors every single day on this issue.
23 But I think what the court will do is remind them when we
24 break for lunch and at the end of the day, continue to remind
25 them of the important nature of that concern, and remind them

1 that if we discover that such an issue starts to occur among
2 the jurors that that's the reason we might have to sequester a
3 jury, and I don't think any us want that to occur.

4 MR. CHAPMAN: No, sir.

5 THE COURT: So I think I will address that when the court
6 adjourns, and not certainly any detailed inquiry but certainly
7 reminding them of their obligations and importance and
8 remaining from discussing the case and also looking at any
9 news presentations of the case. So I intend to address that
10 in that fashion at a minimum at this point.

11 MR. CHAPMAN: Thank you, sir. I just note that at one
12 point I believe I tried to bring it to the court's attention
13 yesterday. Yesterday when the court was examining a proffered
14 exhibit by the state, and it was one of the rather bloody
15 ones, Judge, the court was holding the picture in such a
16 fashion that the juror sitting in the extreme, to my right
17 hand rear box, the rear seat of the jury box was maneuvering
18 in such a manner as to view the photograph. I just note that
19 concern here. Thank you, sir.

20 THE COURT: I think you brought that up at the time. I
21 certainly will proceed much more cautiously handling these
22 exhibits. I noticed everyone else has been doing a pretty
23 good job of that, but I moved back to look at it, and I think
24 I tried to get focal length established without the lenses and
25 I think that might have been part of the problem.

1 MR. CHAPMAN: Thank you, sir.

2 THE COURT: I will be more attentive to that, I
3 appreciate that comment.

4 MR. CHAPMAN: Thank you, sir.

5 THE COURT: Any other issues before we bring our jury
6 back in?

7 MR. CHAPMAN: No, sir.

8 THE COURT: With that let's get our jury in, and get
9 under way.

10 (Concludes without the jury present)

11 (JURY IS PRESENT)

12 THE COURT: Counsel, if you could approach the bench just
13 a moment, there is one thing I neglected to visit with you
14 on.

15 (Bench conference)

16 THE COURT: All right, members of the jury, good
17 morning. I think we are ready to get under way. We visited
18 on a few issues here and we are about ready to continue our
19 examination. I know our jurors had sent a little note into
20 the court. I took a look at that and shared it with the
21 attorneys. I think both sides certainly intend to address
22 this concern. And so we will certainly be dealing with that.

23 I appreciate sometimes we get a little impatient
24 because these cases do move along a little slow, particularly
25 at the beginning of the case. So bear with us, I think the

1 concerns that you have both sides are well aware of that
2 question and have made some efforts and prepared some exhibits
3 to address exactly what your concerns are. So bear with us,
4 we will get there. Thank you.

5 Mr. Verharen.

6 MR. VERHAREN: Thank you, Judge.

7 BRAD MASKELL

8 DIRECT EXAMINATION (cont'd)

9 BY MR. VERHAREN:

10 Q. Sergeant Maskell, when you were at Scarcello Road
11 there at the scene where this occurred, did you examine
12 Mrs. Larsen's body?

13 A. Yes, I did.

14 MR. CHAPMAN: Objection, that's been asked and answered,
15 sir, I'd move to strike.

16 THE COURT: I believe it certainly has, but I think
17 that's a preface of where we are headed the first thing this
18 morning. Go ahead.

19 MR. VERHAREN: Thank you, Judge.

20 Q. (By Mr. Verharen) Did you examine her head and face
21 area?

22 A. Yes, I did.

23 Q. Did you note any injuries to her head and face?

24 A. Yes.

25 Q. Can you describe that for us, please?

1 A. Yes. Mrs. Larsen had severe head trauma,
2 specifically to the left side of her forehead, the upper left
3 side skull area there was hair that had been torn off, tissue
4 had been torn off, and there was an open skull fracture, and
5 then there was other pattern injuries on her face as well as
6 on her neck.

7 Q. What do you mean pattern injuries?

8 A. Injuries that are consistent with the body having
9 come into contact with items at the scene.

10 Q. Can you describe that a little more specifically?

11 A. Yes. There was pattern injuries on her face that
12 would be consistent with pressure being applied to her head
13 against the rough surface of the pavement leaving a pattern on
14 various portions of her forehead and face that looked very
15 much like the corrugated look of pavement. In addition to
16 that there was some pressure marks on her neck. Two marks on
17 her neck that appeared to be consistent with her neck having
18 been pressed upon by something that created those marks.

19 Q. The open skull fracture, that was on the left side
20 of her head?

21 A. Yes.

22 Q. What side of her head were these impressions?

23 A. Well, the impressions, I believe, as I recall, were
24 on the right side of her neck, the two. And then the pattern
25 injuries from the pavement were kind of over her forehead and

1 cheeks.

2 Q. Which side of her forehead and cheeks were those on?

3 A. I'd have to refresh my memory.

4 Q. Let me send a photograph your way. It's 61, if the
5 witness could be shown number 61.

6 Does that refresh your memory?

7 A. Yes.

8 Q. Describe what side those pattern injuries were on?

9 A. Again specific to the two pressure point injuries
10 are again on the right side of her neck just below her ear.
11 The pattern injuries from what happened to be consistent with
12 the surface that she was laying on, the pavement, are on her
13 upper right forehead. Her right cheekbone here and then the
14 right side of her jaw line.

15 Q. So it's the other side of her head that has the
16 skull fracture?

17 A. That was the most prominent one. There's other
18 injuries as well.

19 Q. When you were looking at Mrs. Larsen and the injury
20 to her head there, the skull fracture, did you note the color
21 of her hair that was left on her head?

22 A. Yes.

23 Q. At some point I think you talked about collecting a
24 clump of hair from the scene there. Can you again describe
25 for us whereabouts that clump of hair was in relationship to

1 Mrs. Larsen?

2 A. Sure.

3 MR. CHAPMAN: Your Honor, I'd object, that question
4 assumes facts not in evidence.

5 THE COURT: I think we discussed this yesterday that
6 there has been no scientific evidence, but certainly the
7 witness has testified to what he felt appeared to be hair. So
8 I think we're going to proceed with that caveat, if you will,
9 Mr. Verharen.

10 MR. VERHAREN: Thank you, Judge.

11 THE COURT: Go ahead, continue.

12 Q. (By Mr. Verharen) In your career have you collected
13 hair before?

14 A. Yes.

15 Q. Many times?

16 A. Yes.

17 Q. Are you familiar with color and consistency of hair?

18 A. Yes.

19 Q. Do you feel like when you see hair that you can
20 identify it as such based on your training and experience as
21 well as the fact that you have a head of hair yourself?

22 A. Yes.

23 Q. Okay. The hair that was on the roadway there, what
24 did you think that was based on common sense, training and
25 experience.

1 MR. CHAPMAN: Objection, Your Honor, the witness is being
2 asked to speculate.
3 THE COURT: Overruled, you can answer the question.
4 A. I believe that the hair had come from the head of
5 the victim.
6 Q. Why did you believe that?
7 A. The hair was deposited in the blood smear pattern
8 that connected to the body of the victim. The hair also
9 matched the color and consistency of the hair that was on
10 Vonette's head.
11 Q. Did the size of that clump of hair also match the
12 missing part of hair that was on her head?
13 MR. CHAPMAN: Objection, Your Honor, absent a medical
14 foundation I don't believe this witness has been qualified to
15 answer such a question.
16 THE COURT: I'll disagree, I'll overrule. Continue.
17 A. I did not compare the hair that I collected to any
18 portion of her head.
19 Q. In terms of the size of it, though, did it appear to
20 be consistent with the size of the hair that was missing from
21 her head?
22 A. Yes.
23 MR. VERHAREN: Move to admit 162.
24 THE COURT: In addition to other issues discussed, do you
25 have any objection to 162, Mr. Chapman?

1 MR. CHAPMAN: Your Honor, I believe, now that everybody
2 has seen it, I believe --
3 THE COURT: Do you wish to examine the exhibit?
4 MR. CHAPMAN: No, sir, I do not. I can see it from here
5 as can the whole courtroom. I have stated my objections
6 previously, I won't take the court's time of doing it again.
7 Thank you, Judge.
8 THE COURT: I think there's adequate foundation that's
9 now been established, I'll allow exhibit 162 to be admitted.
10 You can mark that admitted and pass that back to the witness.
11 Q. (By Mr. Verharen) Sergeant, I'd like to run through
12 the exhibits we had introduced yesterday, and start with
13 Plaintiff's exhibit 2. Bring it around here so you can
14 hopefully see it and so can the jury.
15 THE COURT: We might note for the jury, we admitted a
16 smaller photograph of this exhibit earlier, that was exhibit
17 2, and we replaced it with a larger photograph because our
18 machinery wasn't working quite well enough to display this to
19 the jury. So that's our new exhibit 2.
20 Q. (By Mr. Verharen) Sergeant, can you describe what
21 you have going there in Plaintiff's exhibit 2? Do you have a
22 laser pointer with you?
23 A. I do.
24 Q. If that would help you point out things, that would
25 be fine.

1 A. Sure. This is a satellite image of the area where
2 this incident took place. And an image that encompasses the
3 entire geographic area that's involved in this incident. And
4 I had this done using the county GIS satellite mapping
5 system. The area depicted on this map shows the roads
6 involved, Scarcello Road here, Ramsey Road here, going up to
7 Brunner Road going across here. Weir road going up here, and
8 Seasons Road coming across here. Also show where State
9 Highway 41 comes down, and also the extension of Ramsey over
10 here on the west side, and Lone Mountain Road.
11 Q. Can you indicate for us, using your pointer there,
12 the instant location, the Cunningham residence as well as the
13 Bronson place?
14 A. Yes. The location of this incident is right down
15 here on the bottom left corner. The Cunningham home is right
16 in this area right in here. And the Bronson home is going to
17 be right in this area here.
18 MR. VERHAREN: Thank you. May I have 2 through 7 and 9,
19 please?
20 Judge, with the court's permission, can the witness
21 approach the jury and show them the exhibits?
22 THE COURT: That would be fine. And again, counsel, if
23 you want to position yourselves so you can share in the
24 viewing of the exhibits.
25 Q. (By Mr. Verharen) Sergeant Maskell, let me hand

1 you number 3. And if you could, so the entire jury can see,
2 show them what that represents and the incident location as
3 well as the Cunningham location.
4 A. Sure. This the aerial photograph that I took from
5 the helicopter that day. This photograph is taken from the
6 eastern end of Scarcello Road looking directly down Scarcello
7 Road. In the foreground in this area here is where the
8 Cunningham home is located. And then directly down and
9 through this little curve here and right here is where the
10 incident location is happening.
11 Q. How about number 4?
12 A. This is another photograph overlooking Scarcello
13 Road, again from the air that I took. A little closer to that
14 specific incident location being this intersection right here.
15 Q. Number 5?
16 A. A much closer photograph taken from a perspective
17 slightly to the south side of the intersection and directly
18 overhead depicting the intersection.
19 Q. Number 6?
20 A. And again another perspective taken from a little
21 bit on the north side of the intersection as an overhead
22 viewing directly down onto the specific incident location.
23 Q. 7?
24 A. This is an overhead of the Cunningham home that I
25 took from the helicopter that day depicting the driveway into

1 A. From the time of the incident until the time Deputy
2 Klinkefus arrived on scene.
3 Q. Have you reviewed the tape recording from
4 Deputy Klinkefus's video camera?
5 A. Yes.
6 Q. Was the scene secure when Deputy Klinkefus arrived?
7 A. Yes.
8 Q. Are there not vehicles driving through the scene
9 when Deputy Klinkefus arrived?
10 A. Yes.
11 Q. Are there not people walking around the scene when
12 Deputy Klinkefus arrived?
13 A. Depends upon what part of the scene you're speaking
14 of and which people you're speaking of.
15 Q. But the answer is otherwise yes, is it not?
16 A. Yes.
17 Q. The ambulance drove through the scene?
18 A. Yes.
19 Q. In fact in Deputy Klinkefus's tape there is a truck
20 that drives through and right around the body of Mrs. Larsen,
21 is there not?
22 A. It passes through the scene.
23 Q. Maybe we will get to see that tape. Sergeant, you
24 have been through, when you were visiting with Mr. Verharen,
25 the time it took you to arrive. You talked with Deputy

1 usual, sir, that the discharge of that weapon will leave a
2 residue on someone's hands or clothing?
3 A. That's my understanding, yes.
4 Q. And can we say GSR for gunshot residue, is that a
5 common acronym?
6 A. Yes.
7 Q. Sergeant, is it possible to take a test, a chemical
8 test or other tests that you have been trained to do to
9 determine anything about gunshot residue?
10 A. Yes.
11 Q. Have you done that in the past?
12 A. No.
13 Q. Are you equipped to do that?
14 A. Yes.
15 Q. Do the taxpayers supply you with a kit that can be
16 used to take gunshot residue tests?
17 A. As of about a month ago.
18 Q. They hadn't bought you one in January of this year?
19 A. There is a reason.
20 Q. Pardon?
21 A. There is a reason.
22 Q. Would you just answer the question, please.
23 A. That's correct.
24 Q. To your knowledge, sir, was a gunshot residue test
25 conducted on Mr. Larsen?

1 Klinkefus when you began this investigation, did you not?
2 A. When I arrived at the scene.
3 Q. And you talked to a Detective Stewart?
4 A. Yes.
5 Q. Sergeant, without going into detail, from the
6 information you gathered there you developed a theory of what
7 happened, did you not?
8 A. Yes.
9 Q. And that was prior to any interviews you may have
10 conducted of family members or other witnesses?
11 A. Yes.
12 Q. Sergeant, in your training and experience when you
13 are conducting an investigation interviewing witnesses, is it
14 appropriate to ask leading questions of those witnesses?
15 A. It depends on the situation.
16 Q. Is it appropriate to suggest to an interviewing
17 witness an answer to your questions other than the one that
18 the witness gave you?
19 A. Again depending upon the circumstances of the
20 interview.
21 Q. In other words, when you're not hearing what you
22 want to hear you can change the answer; is that correct, sir?
23 A. That would be inappropriate.
24 Q. Sergeant, in your training, training in
25 investigations, when a weapon has been fired is it possible or

1 A. No.
2 Q. To your knowledge, sir, was a gunshot residue test
3 conducted on Mrs. Larsen?
4 A. No.
5 Q. Sergeant, to your knowledge, and I refer to the
6 whole of the Kootenai County Sheriff's department, has the
7 Kootenai County Sheriff's department ever done, to your
8 knowledge, a gun residue test?
9 A. To my knowledge, no.
10 Q. Is there a policy against it?
11 A. No.
12 Q. Is gunshot residue good evidence, in the course of
13 your training and experience is it scientifically accepted?
14 A. It's recognized today as poor evidence.
15 Q. As poor evidence?
16 A. Yes.
17 Q. Why is that?
18 A. The reason that it's considered poor evidence is
19 that it is not specific enough for the identification of an
20 actual shooter in an incident. There are some variables with
21 regards to gunshot residue that would lead a positive test,
22 doesn't necessarily mean that a person had recently fired a
23 weapon. It means simply that that person might have been in
24 contact with a recently fired weapon. They may have shook
25 hands with a person or held holds with a person who recently

1 fired a weapon. They may have touched the surface where a
2 weapon sat that had been recently fired. They may have been
3 in the same room where a weapon had been recently fired.
4 There's many variables to the GSR test.

5 Q. Sergeant, while we're talking about guns, have you
6 had extensive training, well, have you had training in the
7 operation of firearms?

8 A. Yes, I have.

9 Q. Have you had training in the operation of different
10 sorts of firearms?

11 A. Yes, I have.

12 Q. Have you had training in the characteristics of
13 different sorts of firearms?

14 A. Yes.

15 Q. In fact you carry a firearm in the ordinary course
16 of your duties, do you not, sir?

17 A. Yes, I do.

18 Q. Are you familiar with a .44 caliber firearm, sir?

19 A. Yes, I am.

20 Q. Are you familiar with a .44 caliber handgun, sir?

21 A. Yes, I am.

22 Q. Are you familiar with a .44 caliber handgun that was
23 associated with this incident?

24 A. Yes, I am.

25 Q. Have you examined that firearm, sir?

1 A. Yes.

2 Q. Officer, when such a weapon is fired, well, have you
3 fired the same exact model that was used in this case?

4 A. A similar model.

5 Q. A similar model. When one fires such a handgun,
6 Detective, is there a recoil associated with that?

7 A. Yes.

8 Q. Can you describe that recoil for us, please?

9 A. I'll do my best. When you fire the handgun, the
10 handgun discharges and creates a shock wave in your hand and
11 it jerks your hand a little bit.

12 Q. A little bit. What's a little bit?

13 A. It depends on the shooter.

14 Q. Did you examine the type of ammunition that was in
15 the gun that Mr. Larsen shot?

16 A. I have looked at the shell casings.

17 Q. Can you identify the type of ammunition used from
18 the shell casings based on your training and experience, sir?

19 A. All but the bullet type.

20 Q. All but the bullet type. Speaking of the bullet
21 type, sir, when you were visiting with Mr. Verharen we noted
22 at least two gunshot holes in the Blazer, would that be a fair
23 statement?

24 A. Yes.

25 Q. To your knowledge, sir, during the investigation of

1 A. I've looked at it.

2 Q. Sir, for those of us not real familiar with guns,
3 would you say that a .44 caliber handgun is a large handgun as
4 far as caliber goes?

5 A. .44 caliber handgun is a large caliber handgun, yes.

6 Q. As opposed, say, something like a .22 caliber
7 handgun, would the projectile from a .22 be smaller than
8 a .44?

9 A. Yes, it would be .22 caliber as opposed to
10 .44 caliber.

11 Q. To your knowledge, sir, does the discharge of
12 a .44 caliber handgun make a little noise?

13 A. Yes.

14 Q. Does it make a lot of noise?

15 A. It makes a gunshot.

16 Q. Does a .44 caliber handgun make a louder noise
17 than a .22 caliber handgun?

18 A. Yes.

19 Q. Did you fire the particular handgun associated with
20 this case?

21 A. No.

22 Q. Officer, have you fired a .44 caliber handgun?

23 A. Yes.

24 Q. Have you fired a .44 caliber handgun similar to the
25 handgun that we associate with this matter?

1 this scene, were the actual projectiles ever recovered?

2 A. No.

3 Q. Did you learn, sir, during the course of your
4 investigation that five shots were actually fired from that
5 gun during this incident?

6 A. Yes.

7 Q. And none of the projectiles were recovered?

8 A. No.

9 Q. To your knowledge, sir, was an investigation of the
10 Blazer conducted?

11 A. Yes.

12 Q. Was the protectile, any projectile recovered from
13 the Blazer?

14 A. I don't believe so.

15 Q. I'm not going to take the time to go dig out one of
16 the hundreds of glossy photographs unless you need it to
17 answer this question, and we can certainly do that if you want
18 to. But you showed us in one of those photographs a rather
19 close view of what you said was a projectile hole, I believe
20 it was the front passenger side of that Blazer, do you
21 remember that?

22 A. Yes, I do.

23 Q. Sir, based on your training and experience can you
24 determine from the size of that hole the distance at which
25 that projectile was fired?

1 A. No.
 2 Q. Sir, based on your training and experience can you
 3 determine the angle at which that projectile was fired?
 4 A. Yes.
 5 Q. But you can't tell us how far away that was fired,
 6 did I hear that right?
 7 MR. VERHAREN: Objection, asked and answered.
 8 THE COURT: Overruled, you can answer the question.
 9 A. Would you restate that question?
 10 Q. (By Mr. Chapman) Yes. Officer, can you tell us
 11 from how far away that projectile was fired?
 12 A. No.
 13 Q. If you had recovered one of the bullets could you
 14 tell us from how far away it was fired?
 15 A. No.
 16 Q. Would that not have assisted you at all?
 17 A. Restate that again.
 18 Q. Would it help in a determination from how far away
 19 that bullet was fired if you had been able to recover and
 20 analyze that projectile?
 21 A. You can't determine how far away a gun was fired
 22 from analysis of the projectile.
 23 Q. Can you, sometimes, sir, determine from how far away
 24 a gun was fired by analysis of a residue on a surface which it
 25 passed?

1 A. Depending upon the surface and the circumstances.
 2 Q. Was such an analysis conducted in this case?
 3 A. No.
 4 Q. Have you ever been shot at, sir?
 5 MR. VERHAREN: Objection, relevance.
 6 THE COURT: Sustained.
 7 Q. (By Mr. Chapman) When we look at what's been
 8 admitted as Plaintiff's 2, a rather large photograph that you
 9 visited with Mr. Verharen in regard to?
 10 A. Yes.
 11 Q. This is a fairly wooded area where this incident
 12 took place, if I've got it right?
 13 A. I think you can see that it's actually sparsely
 14 wooded, but there are trees in the area.
 15 Q. To your knowledge, sir, was a search conducted for
 16 any of these projectiles?
 17 A. No.
 18 Q. Would an analysis of the bullet's path through the
 19 steel of that Blazer help us in determining what kind of
 20 projectile was fired?
 21 A. Once again?
 22 Q. Would an analysis of the path that the bullet that
 23 was fired into the front passenger side of the Blazer, that's
 24 the one I'm talking about, would an analysis of the path of
 25 that bullet help in a determination of what kind of projectile

1 was fired?
 2 A. No.
 3 Q. We have established you don't have a degree in
 4 physics, sir?
 5 A. Correct.
 6 MR. VERHAREN: Objection, asked and answered.
 7 THE COURT: Sustained.
 8 Q. (By Mr. Chapman) Sir, in all of those many
 9 photographs that we have looked at with you, some of them
 10 showed the red car, the Subaru, do you remember those?
 11 A. Yes, I do.
 12 Q. Can you tell this jury if the position of the Subaru
 13 in those photographs was the position of the Subaru after the
 14 Blazer had left the scene?
 15 A. No.
 16 Q. Let's go back a little bit, Officer, to when you
 17 responded to the scene. From what I understand you were
 18 conducting some personal business and took some time to
 19 respond because you got the call, had to go get your sheriff's
 20 car and respond to the scene, did I get that right?
 21 A. Good enough.
 22 Q. Good enough. Sir, did you respond code 2 or code 3?
 23 A. Neither.
 24 Q. Neither. How did you respond?
 25 A. I drove normally to the scene.

1 Q. Did you travel southbound on Ramsey to get there?
 2 A. No.
 3 Q. How did you get there?
 4 A. I drove from the sheriff's office north on Highway
 5 95, I turned westbound on Bockel Road. I turned northbound on
 6 Ramsey, crossed Highway 53 and turned westbound again on
 7 Scarcello.
 8 Q. So you didn't come down Ramsey?
 9 A. No.
 10 MR. VERHAREN: Objection, asked and answered.
 11 MR. CHAPMAN: Just trying to clarify, Judge.
 12 THE COURT: Overruled, that's fine.
 13 MR. CHAPMAN: Judge, I'm wondering if this would be an
 14 appropriate time to take the morning break? These folks have
 15 been sitting down for awhile.
 16 THE COURT: If you need to review some things to finish
 17 the examination, probably would be just as good as any other
 18 time, we can do that, that would be fine.
 19 Members of the jury, we will go ahead and break at
 20 this point. And I again would admonish you not to discuss the
 21 case among yourselves nor with others, nor shall you form or
 22 express an opinion about it until it is finally submitted to
 23 you. With that we will take about 15 minutes, we'll be in
 24 recess. Thank you.
 25 (Recess)

1 (WITHOUT THE JURY PRESENT)

2 THE COURT: I think we are ready to get under way. I
3 believe my bailiff had a question about what time we will be
4 completing our law day tomorrow. Has he communicated back to
5 you, Mr. Verharen?

6 MR. VERHAREN: He said you were going to shoot for 9, but
7 maybe 9:30.

8 THE COURT: I'm going to try my best at 9. If I have
9 more matters left I may continue one. As you know, sometimes
10 they continue on their own. I'm going to give this priority
11 and try to get started as close to 9 as we can.

12 MR. VERHAREN: Thank you, Judge.

13 THE COURT: Are we ready to get under way?

14 MR. VERHAREN: Actually, Judge, since we have the jury
15 out, maybe we could take something up. I anticipate after
16 Sergeant Maskell here testifies, I'm going to put Joleen
17 Larsen on the stand, and again I'm going to make a motion to
18 exclude any reference to the tort claim that's been filed in
19 this particular instance. I don't think it has any relevance
20 at all and I don't think it should be brought up.

21 THE COURT: I know we visited on this issued a little
22 bit, but maybe you can provide the court with a little more
23 detail as to the nature of any tort claim, who actually has
24 filed it.

25 MR. VERHAREN: Maybe the best thing to do is mark it as

1 to it.

2 THE COURT: Thank you. And Miss Taylor.

3 MS. TAYLOR: Your Honor, thank you. We would like to be
4 able to bring up the tort claim for a couple of reasons. One,
5 a statement in the tort claim itself is contradicted by
6 reports and expected testimony of some of the state's own
7 witnesses.

8 Judge, I think this tort claim indicates motive and
9 bias in this case. We have had a couple of preliminary
10 hearings and there has been some alterations in testimony,
11 some kind of exaggerations. And I think that the fact of
12 this tort claim shows motive for those exaggerations, and
13 it's important for us to be able to fully confront and
14 cross-examine the witnesses, the Larsen family.

15 THE COURT: Anything further, Mr. Verharen?

16 MR. VERHAREN: First of all, I'm not sure which statement
17 counsel is referring to. Secondly, I don't know specifically
18 what this would have to do in terms of motive and bias. We
19 just have a general statement here that it would go to motive
20 and bias but without any specifics at all. I think without
21 any more specific offer of proof here, I don't see how it can
22 be relevant.

23 THE COURT: Maybe we can pigeonhole the statement itself
24 as to which statement that you're referring to.

25 MS. TAYLOR: Yes, Judge. On page 2 midway down of the

1 an exhibit. Call it 165.

2 THE COURT: You're not marking it to be offered as an
3 exhibit for the jury's consideration?

4 MR. VERHAREN: No, do you want to call it something
5 else?

6 THE COURT: Maybe we can refer to it as court's exhibit A
7 at this point. It may be remarked for some purpose for the
8 jury's consideration.

9 MR. VERHAREN: No, do you want to call it something else?

10 THE COURT: Let's call it court's exhibit A for purposes
11 of this motion only. Have you shown a copy of it to counsel?

12 MR. VERHAREN: Yes.

13 MR. CHAPMAN: We have, sir.

14 MS. TAYLOR: Yes, Judge.

15 THE COURT: I don't know who will be addressing this
16 issue.

17 MS. TAYLOR: I will be, Your Honor.

18 THE COURT: I've had a chance to review the exhibit. Go
19 ahead now with your motion, Mr. Verharen.

20 MR. VERHAREN: Again, Judge, I'm simply moving to exclude
21 any reference to that tort claim in any of the questioning of
22 any of the witnesses because I feel it has no relevance at all
23 to any part of this case, and I think any reference to it is
24 going to be a lot more prejudicial than it would be
25 probative. And so I think you ought to exclude any reference

1 page it speaks of Deputy Klinkefus gave paperwork to Jovon and
2 Joleen Larsen and then abandoned Jovon and Joleen Larsen by
3 driving off and leaving. That's not quite the way it
4 happened. There were instructions given. At that time Deputy
5 Klinkefus told the Larsens what he would be doing, that he
6 would be going to the area to check. I think that misstates
7 things that are already of record in this case.

8 And, Judge, with regard to motive and bias, there
9 have been changes in statements between the time the
10 statements were given to Deputy Klinkefus and then Deputy
11 Stewart, and finally Sergeant Maskell, and then the two
12 preliminary hearings. There have been exaggerations, and I
13 think taht we need to be able to show some motive for those
14 exaggerations and the changes in statement.

15 This right here is motive, there is a lawsuit
16 pending now. And I think it's important for the jury to
17 understand that and to hear that. Mr. Ellington has a right
18 to fully cross-examine any motive or any bias a witness may
19 have in testifying against him, and that's what we would like
20 to do.

21 MR. VERHAREN: As to the statement Deputy Klinkefus gave
22 paperwork to Jovon and Jolene, that's true, he did give
23 paperwork to them. The word abandoned here seems to be the
24 word that counsel is focusing on. And it seems to me that
25 it's something an attorney has stuck in that phrase. Counsel

1 is attempting to use that word that the attorney for the
2 Larsen family stuck in that phrase against the Larsen family.
3 And again in terms of motive and bias, I haven't
4 heard anything specific about how this would conflict with
5 that. And so, Judge, I think without more you ought to
6 exclude it and any reference to it in terms of any reference
7 to the Larsen family.

8 THE COURT: The motion here in front of the court
9 basically pertains to the notice of tort claim that was
10 apparently filed here on behalf of the Larsen family on the
11 16th of May of this year which pertains obviously to this
12 particular incident. The tort claim alleges negligence on the
13 part of the government entity, essentially Kootenai County
14 Sheriff's department, more specifically Deputy Klinkefus.

15 The claim that's alleged here seeks an amount in
16 excess of \$1,000,000. The Idaho Tort Claim Act, of course,
17 requires that prior to filing any lawsuit, any tort claim
18 against a government entity that there must first be addressed
19 with the government entity filing of tort claim within a
20 specified time frame, and that's apparently what has occurred
21 here. This tort claim would purportedly have been filed by an
22 agent of the Larsens. It does seek substantial damages. In
23 order to prevail ultimately on a tort claim for negligence
24 there must be established, first of all, a duty, a breach of
25 that duty on the part of the defendants and proximate

1 causation, or I should say injuries, and then proximate
2 causation of those injuries with respect to the breach of that
3 duty.

4 And so that's essentially what this claim would
5 speak to. Now in any case bias is always an issue. In this
6 particular case there obviously will be testimony presented
7 from a number of sources, including Kootenai County Sheriff's
8 department and their lawful dutiful investigation of this
9 case. There will be testimony, I would suspect, by Jovon,
10 Jolene and Joel Larsen with respect to the incident that took
11 place. I could only surmise that based on this tort claim and
12 the allegations in the tort claim that there may be a
13 difference of opinion in terms of what transpired and
14 testimony from what certain members of the sheriff's
15 department may testify to and the Larsen family may testify
16 to. There also certainly, as I pointed out earlier, a
17 requirement in any tort proceeding that there must not only be
18 a duty breached, which would be a duty on the part of the
19 sheriff's office, injuries resulting from that duty, which
20 certainly are alleged probably not in dispute at least between
21 those two entities. And then finally the approximate
22 causation. So there certainly is a motive for the Larsens to
23 establish that the injuries that have occurred and the
24 causation factor exists and can be established through the
25 course of this proceeding. So I think there is a legitimate

1 issue of bias that may come from the allegations set forth in
2 this tort claim. And so I think that it would be appropriate
3 to allow Mr. Ellington to make some, at please limited,
4 inquiry, provided, of course, any time the court makes a
5 motion in limine provided the proper foundation was laid. But
6 I think it would be legitimate to make a limited inquiry into
7 the fact that the tort claim has been filed. I had asked to
8 review it earlier when we brought this motion up and it
9 appears that all three of the Larsen family members have
10 asserted such a claim.

11 So I think it would be sufficient to allow the
12 defense to inquire into this during cross-examination provided
13 the proper foundation, of course, is established. I'll note
14 the state's objection on this point. But I'm going to allow
15 counsel for Mr. Ellington to make some inquiry into this area.

16 Anything else?

17 MR. VERHAREN: Yes, sir, limited to what extent?

18 THE COURT: I don't know how far they're going to try to
19 go on this. I don't think we are going to try the tort case,
20 I can assure counsel of that. I think the fact that they
21 filed a tort claim certainly can be inquired into for purposes
22 of bias. There are some statements that have been made
23 through an agent provided proper foundation is made in that
24 regard, and certainly some inquiry as to those statements that
25 they have advanced in the tort claim as they may be

1 inconsistent with other evidence or their own testimony that
2 may be advanced may certainly inquired into.

3 I don't know if that clarifies it enough or not, Mr.
4 Verharen.

5 MR. VERHAREN: Thank you, it does.

6 THE COURT: Any questions, Miss Taylor?

7 MS. TAYLOR: No, Your Honor.

8 THE COURT: And I appreciate you bringing that to the
9 court's attention at this time, Mr. Verharen. Are we ready to
10 get under way?

11 MR. CHAPMAN: Judge, there is one very brief matter, sir,
12 that I would like to make a record of. During a recess or at
13 some time in this morning's proceedings the court brought to
14 counsel's and our attention that a juror through Mr. Bailiff
15 had sent a note to the court. First off, sir, could that be
16 court's 2 or court's B or something like that so that we have
17 it as a record?

18 THE COURT: I do retain these notes. I suspect in a two
19 week plus trial this will be one of many notes I receive from
20 the jury. And so I real retain that, and I appreciate we
21 made a record at the bench because I neglected to bring it
22 up earlier. And as I pointed out to counsel, it sounds like
23 the juror's concern was remedied by our substitution of
24 Exhibit 2. They had wanted a detailed drawing of what had
25 happened during the incident and suggested a dry erase board

1 or aerial photo. As we are all aware Exhibit 2 replaced with
2 much larger exhibit presented to the jury.
3 I can assure you I have those, I don't know if I
4 need to list this as an exhibit right now, but I will be
5 retaining all the notes and communication from the jurors that
6 are presented to the court.

7 MR. CHAPMAN: Thank you, sir. The particular point of
8 concern with that note is the way that it's phrased. The way
9 that it's phrased, sir, and please correct me if I am
10 incorrect in stating this, is that we, stated in the
11 collective, sir, it's stated like it is the result of a
12 conversation about this case between jurors. It is stated, I
13 don't think he's using the imperial we, Judge, he or she or
14 whoever wrote that note. But I think you have evidence, sir,
15 before you from which a reasonable inference can be made that
16 these jurors are not obeying the court's directives in this
17 regard.

18 I brought up the issue of publicity and other things
19 to you before. But, sir, that's, at least to my mind, a red
20 flag that says this case is being discussed by its use of the
21 word we. If it had said it would be a whole different story.
22 But that seems to indicate that this jury is not obeying this
23 court's admonishments.

24 Thank you, sir.

25 THE COURT: Maybe Mr. Flock can help us out. How did

1 this note come about? Because we had communication and seemed
2 to me after you-- I believe as I recall yesterday the jury
3 made an inquiry that they wanted to ask questions of the
4 witnesses, and as we know that can be done. I don't subscribe
5 to that process, and I let the bailiff know that they would
6 not be in a position to ask questions. And then as the jurors
7 were leaving one of them handed this to the bailiff, is that a
8 fair statement of what you relayed to me yesterday?

9 BAILIFF MR. FLOCK: Yes, sir.

10 THE COURT: Okay, fine. Again we will note your
11 concerns. And I think that's a legitimate concern. On the
12 other hand, I don't know that the note really indicates that
13 they have been discussing facts of the case rather than their
14 ability to view the evidence. As I see this, they want to
15 look at something a little larger or a little easier to see.

16 And I think the record should earlier note we had a
17 Power Point presentation already from the state, and it just
18 didn't project clear enough for the state to do that which
19 this juror apparently was concerned about. That was fixed
20 this morning when we had exhibit 2 replaced to reflect a
21 larger aerial view.

22 So while I think that's a legitimate thing to keep
23 tabs on, Mr. Chapman, right now it appears to me that the note
24 may indicate that the jurors thought perhaps about their
25 ability to read, perceive and view the evidence, but not so

1 much about the veracity of the evidence itself at this point.
2 We will certainly retain these notes throughout the course of
3 the trial.

4 MR. CHAPMAN: Thank you, sir.

5 THE COURT: Anything else?

6 MR. VERHAREN: No, Judge.

7 BAILIFF MR. FLOCK: For the record, Judge, number 3 and
8 10.

9 THE COURT: Yes. Juror 3 was having some difficulty
10 seeing some of the exhibits during Sergeant Maskell's
11 testimony, and I let the jury know that if that juror wanted
12 to trade with another juror so that juror could be in the
13 front row. And I think as a result juror 3 and juror 10 have
14 swapped places.

15 (Concludes without the jury present)

16 (JURY IS PRESENT)

17 THE COURT: I think we are ready to get under way.

18 Mr. Chapman, you can continue your cross-examination
19 of Sergeant Maskell.

20 BRAD MASKELL

21 CROSS-EXAMINATION (cont'd)

22 BY MR. CHAPMAN:

23 Q. Sergeant, just a few more points. When you were
24 visiting with Mr. Verharen about your look-see into the
25 Cunningham home, do you remember that?

1 A. Yes.

2 Q. Sir, you said that you saw a Zima bottle in there;
3 is that correct?

4 A. Yes.

5 Q. Sergeant, at one point in your visit with
6 Mr. Verharen you mentioned that you obtained a tape from the
7 911 center; is that correct?

8 A. Yes.

9 Q. You mentioned that you didn't like, that's probably
10 not the way to say it. You were unsatisfied with the quality
11 of the first tape so you went and obtained a second version?

12 A. That's correct.

13 Q. That second version was digital?

14 A. That's correct.

15 Q. Sergeant, and that's the version that you testified
16 that you sent to this, was it Rocky Mountain Information
17 Network or something like that?

18 A. That's correct.

19 Q. Sergeant, before you did that you made inquiries of
20 Motorola Corporation, did you not?

21 A. Yes, I did.

22 Q. Prior to sending this tape to this Rocky Mountain
23 place you communicated with Motorola?

24 A. I did.

25 Q. Motorola answered your concerns?

1 A. Yes.
 2 Q. But then you decided to send the tape away anyway?
 3 A. Yes.
 4 Q. You were not satisfied with the letter from
 5 Motorola?
 6 A. Absolutely not.
 7 Q. And in fact it didn't fit with your theory of the
 8 case?
 9 A. That's not correct.
 10 Q. Sergeant, a lot of this morning, and if my memory
 11 serves me well, yesterday afternoon, we have admitted many,
 12 many exhibits, have we not, sir?
 13 A. Yes.
 14 Q. And in fact the state has admitted what you call a
 15 paint chip, what you call hair, many, many photographs, would
 16 that be a fair statement?
 17 A. Yes.
 18 Q. Sergeant, where is the gun?
 19 A. Pardon me?
 20 Q. Where is the gun?
 21 A. In evidence.
 22 Q. Speaking of that gun, during the course of your
 23 investigation did you receive information that the gun was
 24 placed under the seat of the Subaru?
 25 A. Yes.

1 Q. And in fact you received information that this gun
 2 was placed underneath the passenger seat of the Subaru?
 3 A. Yes.
 4 Q. You received information that Mrs. Larsen was
 5 driving the Subaru?
 6 A. Yes, I did.
 7 Q. At the time of the incident, okay. And that
 8 Mr. Larsen was in the passenger seat of the Subaru, let's say
 9 when the chase, before the actual contact of the vehicles,
 10 Mr. Larsen was in the passenger seat of the Subaru?
 11 A. Yes.
 12 Q. Sergeant, have you ever watched anyone sit in the
 13 passenger seat of the Subaru and try and pull this gun out
 14 from underneath the passenger seat?
 15 A. No.
 16 MR. CHAPMAN: Sergeant, I thank you for your patience
 17 with me, I have no further questions at this time. Just one
 18 moment.
 19 THE COURT: Are you done for now?
 20 MR. CHAPMAN: For now, yes.
 21 THE COURT: Okay, thank you. Go ahead, Mr. Verharen.
 22 MR. VERHAREN: Thank you, Judge.
 23 REDIRECT EXAMINATION
 24 BY MR. VERHAREN:
 25 Q. Sergeant Maskell, did you at some point ever put the

1 gun in this case under the passenger side seat of the Subaru?
 2 A. I did.
 3 Q. Can you describe the circumstances behind that,
 4 please?
 5 A. I was contacted by the public defender's
 6 investigators who wanted to examine the firearm.
 7 MR. CHAPMAN: Your Honor, we need to take up a motion
 8 outside the presence of the jury.
 9 THE COURT: Let's continue with the testimony, we will
 10 certainly do that at the next available break.
 11 Q. (By Mr. Verharen) Go ahead and finish your answer,
 12 please.
 13 A. I withdrew the, I took the firearm from evidence and
 14 provided it to their investigators. They wanted to examine
 15 whether or not it would fit under the passenger seat of the
 16 Subaru. They had some information that suggested the gun may
 17 not fit. So I escorted them to the Subaru itself along with
 18 the firearm and placed the gun under the seat.
 19 Q. Did you have any trouble at all putting this firearm
 20 underneath the passenger seat of the Subaru?
 21 A. No.
 22 Q. The inquiries that you made with Motorola, can you
 23 describe those a little more specifically for us, please?
 24 A. Sure. There had been some question as to whether
 25 or not the sound of the gunfire would be audible on the

1 911 tape. I wanted to know whether or not there might be
 2 reason, me personally I was having difficulty determining what
 3 was gunfire and what wasn't. And I wanted to know whether or
 4 not there might be some reasons why the gunfire would not be
 5 audible.
 6 And so I sent them a letter and I suggested to them
 7 some possible reasons as to why the gunfire may not be audible
 8 basically in an effort to understand the capabilities of the
 9 cell phone that Joleen Larsen was on and whether or not that
 10 cell phone would have difficulty picking up the sound of
 11 gunfire. It had been suggested to me that there may very well
 12 be many reasons as to why, and then I also asked him basically
 13 whether or not the gunfire would be audio.
 14 Q. And the response you got?
 15 A. The response I got was that the gunfire should be
 16 audible on the tape.
 17 Q. So after you got that response, why did you then
 18 send the tape into REMIN for analysis?
 19 A. With that response that it should be audible, I
 20 contemplated whether or not we could do some type of forensic
 21 analysis to further bring out the sound of the gunfire, and
 22 the reason for that would be just to identify how many shots
 23 were audible. First of all, if they are audible at all. If
 24 they are, how many shots are audible and also where the shots
 25 are in relationship to the incident.

1 Q. Why was that important to you?

2 A. I wanted to know if the gunfire was consistent, if
3 the location of the gunfire on the tape was consistent with
4 what was being reported by the victims.

5 Q. I think you were asked a question by Mr. Chapman
6 about why you didn't conduct a search for the bullets that
7 were fired, why is that?

8 A. It simply wasn't indicated nor practical.

9 Q. Why wasn't it practical?

10 A. Because to fire a weapon out into open space and
11 then to go about trying to locate that bullet that went that
12 away, it's like finding a needle in a haystack.

13 Q. Counsel was asking you about your training with
14 firearms and handguns. Do you have an understanding of what a
15 hunting handgun is?

16 A. Yes.

17 Q. Can you describe that for us, please?

18 A. Hunting handguns, there's several types of hunting
19 handguns. Typically, though, they're a large caliber handgun
20 with a long barrel.

21 Q. The handgun that Joel Larsen had in that car, what
22 kind of handgun could you term that?

23 A. A large caliber handgun with a long barrel.

24 Q. Is that consistent with a hunting handgun?

25 MR. CHAPMAN: Objection, there's been no foundation

1 scene security can be thought of in a couple of different
2 ways. The obvious way is that there is a barrier around the
3 scene with a crime scene tape and it's got a physical barrier
4 in front of it. And the other one would be whether or not the
5 activities at the scene can be explained and whether or not
6 there's people there that can be accountable for what takes
7 place at the scene.

8 What I meant by that is in my opinion when the
9 deputies arrive at the scene, the two deputies that were at
10 the scene became vigilant and conscious of what was taking
11 place at the scene. And at that point they're aware of what's
12 taking place and can be accountable for the things that are
13 taking place as they further secure that scene into a
14 barricaded type of a scene.

15 MR. VERHAREN: No further questions.

16 THE COURT: Counsel, Mr. Chapman, Mr. Verharen, and
17 actually Sergeant Maskell, if you will all join me for a just
18 brief discussion before we start our examination.

19 (Bench conference with Sergeant Maskell, Mr. Verharen and
20 Mr. Chapman)

21 THE COURT: All right, thank you. You can have a seat,
22 Sergeant. Mr. Chapman, recross examination.

23 RECROSS EXAMINATION

24 BY MR. CHAPMAN:

25 Q. Sergeant, in terms of of counsel's questions in

1 laid.

2 THE COURT: I'll overrule, you can answer the question.

3 A. Yes.

4 Q. (By Mr. Verharen) Can you indicate for us why it is
5 that the sheriff's department and you don't do GSR testing,
6 please?

7 A. Sure.

8 MR. CHAPMAN: Judge, that's been asked and answered.

9 THE COURT: I believe it was established that he didn't
10 do it, but I don't believe he's had a chance to state the
11 reasons why. Go ahead.

12 A. GSR testing --

13 THE COURT: I take that back. He certainly has testified
14 with respect to some of the problems and the variables, and so
15 we won't go into that area. If that's where your question is
16 headed, I would sustain the objection because he did get into
17 various variables involved, so I would sustain the objection.

18 MR. VERHAREN: Yes, sir.

19 Q. (By Mr. Verharen) Finally, Sergeant, you had some
20 questions about the security at the scene. And I think you
21 answered that despite a vehicle or vehicles driving through
22 the scene shortly after this happened and the fact that there
23 were people there you felt that it was secure. Can you
24 describe why, please?

25 A. The reason I answered that question that way is

1 regard to scene security, integrity of this scene would be
2 damaged by vehicles driving through it, would that be true?

3 A. It depends upon what it is.

4 MR. CHAPMAN: Objection, nonresponsive. Your Honor,
5 would you direct the witness to answer yes or no.

6 THE COURT: I'm not sure it really calls for a yes or no
7 answer. He has answered that it depends. That's appropriate
8 response. I'm not sure your question called for more of an
9 explanation, we can stop him at that time. Continue.

10 MR. CHAPMAN: I'll try and rephrase, Judge.

11 Q. (By Mr. Chapman) Is your opinion that the scene
12 was secure totally eliminate the fact that the evidence could
13 have been moved?

14 A. Yes.

15 Q. From the time of the incident you can testify from
16 your personal knowledge in front of this jury that of all
17 those hundreds of photographs, well, hundreds is an
18 exaggeration, all those multiplicity of photographs, depict
19 that scene exactly as immediately after it happened?

20 A. No.

21 Q. In fact you gained that that Subaru that's depicted
22 in several of those pictures had actually been moved, did you
23 not?

24 A. Yes.

25 Q. Sergeant, you said that, I believe, looking for the

1 projectiles, looking for the evidence was not indicated, would
 2 not be practical, did I hear that testimony correctly, sir?
 3 A. Yes.
 4 Q. If certain statements were made to you, sir, in the
 5 course of your investigation by witnesses and you decided to
 6 test those statements, would not collecting every piece of
 7 physical evidence as you could in as near a condition and as
 8 good a condition as was possible, wouldn't that be indicated?
 9 A. Yes.
 10 Q. If you're charging someone with murder, Sergeant,
 11 don't you think it would be important to collect every bit of
 12 evidence you could?
 13 A. Yes.
 14 Q. Don't you think that it would be important to test
 15 in every way you could the statements that you have been
 16 given?
 17 A. Yes.
 18 Q. To test in every way that you could the witness
 19 statements that you were given and compare it to the physical
 20 evidence?
 21 A. Yes.
 22 Q. To keep an open mind as to the veracity of these
 23 witness statements, would that be important?
 24 A. Yes.
 25 MR. CHAPMAN: I have not further questions at this time,

1 Your Honor. The witness is under our subpoena as well.
 2 THE COURT: Thank you. You can step down, Sergeant.
 3 SERGEANT MASKELL: Thank you.
 4 THE COURT: I think we are done with questioning for the
 5 time being, but I believe he's remaining for the duration of
 6 the proceedings anyway, he's still under subpoena?
 7 MR. VERHAREN: Yes, sir.
 8 THE COURT: All right, thank you very much. Are you
 9 prepared to call your next witness?
 10 MR. VERHAREN: Next witness is Joleen Larsen, Judge. She
 11 is downstairs in our office, but she should be up here
 12 shortly.
 13 THE COURT: Looks like you have a member of your office
 14 on the task here.
 15 Good morning.
 16 JOLEEN LARSEN: Good morning.
 17 THE COURT: If you will come forward, please, and raise
 18 your right hand, the clerk will administer the oath.
 19 JOLEEN LARSEN
 20 was called as a witness on behalf of the
 21 State, having been first duly sworn, was
 22 examined and testified as follows:
 23 THE COURT: Why don't you go ahead and have a seat there,
 24 and as soon as you're comfortable, Mr. Verharen will have some
 25 questions for you.

1 Go ahead, Mr. Verharen.
 2 MR. VERHAREN: Thank you, Judge.
 3 DIRECT EXAMINATION
 4 BY MR. VERHAREN:
 5 Q. Good morning, Joleen.
 6 A. Good morning.
 7 Q. Can you please state your full name and spell your
 8 last name.
 9 A. Joleen Rae Larsen. L-a-r-s-e-n.
 10 Q. What is your date of birth?
 11 A. [REDACTED]
 12 Q. And so how old are you today?
 13 A. Eighteen.
 14 Q. Can you tell us a little bit about your family?
 15 A. There's three girls, mom and dad. We all like the
 16 outdoors, always outside hunting, fishing, foiling,
 17 snowmobiling.
 18 Q. Can you tell us the names and ages of your sisters,
 19 please?
 20 A. Jovon, she is 21, just turned 22. And then my
 21 little sister [REDACTED] is 14.
 22 Q. Can you tell us whether or not Jovon has a child?
 23 A. Yes, she has a younger son.
 24 Q. How old is he and what's his name?
 25 A. He is four and his name is [REDACTED]

1 Q. Can you tell us a little bit about your dad, can you
 2 tell us where he works?
 3 A. He works at Baker Commodities as a renderer.
 4 Q. Does he also drive a truck?
 5 A. Yes.
 6 Q. Can you tell us a little bit about your mom?
 7 A. She's done hair all of her life. She worked at a
 8 couple of different old folks' home doing their hair. She
 9 also worked at a beauty supply store and she had a shop in
 10 their store doing her hair.
 11 Q. Where did she recently have?
 12 A. Centre Beauty Supply.
 13 Q. Is that in Hayden?
 14 A. Coeur d'Alene.
 15 Q. Coeur d'Alene, okay. How long did she work there?
 16 A. Seven years or so, I'd say.
 17 Q. Joel and Vonette, they're your natural mom and dad?
 18 A. Yes.
 19 Q. As they are with Jamie and Jovon?
 20 A. Yes.
 21 Q. Have you lived your entire life with your mother and
 22 your father?
 23 A. Yes.
 24 Q. Back in January of last year, can you tell us what
 25 you were doing and where you were living?

1 A. Of last year or this year?
 2 Q. Where are you living this month, are you living
 3 somewhere different than you were back in January of last
 4 year?
 5 A. Yes, right now I'm living with my sister.
 6 Q. Where is that, I don't need the address, I just need
 7 the town?
 8 A. Hayden.
 9 Q. And is it just you and your sister and your sister's
 10 son Zac?
 11 A. Yes.
 12 Q. Back in January of this year, I think I asked it
 13 wrong, probably confused you, where were you living?
 14 A. At home with my parents.
 15 Q. Where do your parents live?
 16 A. In Athol.
 17 Q. Do you know the address?
 18 A. (Nodded affirmatively).
 19 Q. Can you tell us the address?
 20 A. 2607 West Wesson Avenue.
 21 Q. How long did you and your parents live in Athol
 22 before you moved to your sister's place in Hayden?
 23 A. Eight years.
 24 Q. Can you tell us a little bit about the place in
 25 Athol, is it on some acreage?

1 how your sister Jovon, your father and your mother looked at
 2 that time?
 3 A. Yes.
 4 MR. VERHAREN: Move to admit Plaintiff's 1.
 5 MS. TAYLOR: Your Honor, I'm not sure it's relevant, but
 6 I won't object.
 7 THE COURT: Exhibit 1 can be admitted.
 8 Q. (By Mr. Verharen) Joleen, did Jovon have a Honda
 9 Accord earlier this year?
 10 A. Yes.
 11 Q. Can you tell us what color it is and how long she's
 12 had it, please?
 13 A. It was white, and she probably had it for a year
 14 maybe.
 15 Q. Do you know what year it was or not?
 16 A. '96.
 17 Q. And that was solely your sister's car?
 18 A. Yes.
 19 Q. I want to take you back to the night of December 31,
 20 2005, New Year's Eve, okay?
 21 A. Okay.
 22 Q. Where did you spend the night?
 23 A. I stayed at my sister's house in Hayden.
 24 Q. What was the reason that you did that?
 25 A. We came into Coeur d'Alene for New Year's Eve and we

1 A. 11 acres, log house, two garages, lots of room.
 2 Q. Back in January of this year were you still a
 3 student?
 4 A. Yes.
 5 Q. Where were you going to school?
 6 A. Timberlake High School.
 7 Q. That would have been your senior year then?
 8 A. Yes.
 9 Q. What are you doing now with yourself?
 10 A. I work at a real estate office as a receptionist.
 11 Q. Joleen, let me show you a photograph that's marked
 12 as Plaintiff's Exhibit 1, do you recognize this photograph?
 13 A. Yes.
 14 Q. Can you tell us what this photograph is of?
 15 A. It's of our family.
 16 Q. That would be you and your two sisters and your
 17 sister's son?
 18 A. Yes.
 19 Q. As well as your mom and dad?
 20 A. Yes.
 21 Q. Do you know when this photograph was taken?
 22 A. December.
 23 Q. Of 2005?
 24 A. Yes.
 25 Q. And that's an accurate photograph of your family and

1 were with some friends and partying.
 2 Q. You and your sister?
 3 A. (Nodded affirmatively)
 4 Q. What about your sister's son Zac?
 5 A. He was out at my parents' house.
 6 Q. Did he spend the night there?
 7 A. Yes.
 8 Q. At some point did you and your sister get home from
 9 the party that you went to?
 10 A. Yes.
 11 Q. What time do you think you got home on, I guess it
 12 would be in the morning hours of the 1st?
 13 A. Yes.
 14 Q. What time do you think you got home?
 15 A. About 3:30 or so.
 16 Q. In the morning?
 17 A. Yes.
 18 Q. And then you and your sister went to bed there at
 19 your sister's place?
 20 A. Yes.
 21 Q. What time do you think you and your sister got up
 22 the next morning on New Year's Day?
 23 A. We got up and left the house about 10:30, 11.
 24 Q. In the morning?
 25 A. Yes.

1 Q. Had you had any alcohol the night before?
 2 A. Yes.
 3 Q. How much, was it beer or drinks or do you remember
 4 what it was?
 5 A. It was beers.
 6 Q. How many beers do you think you had the night
 7 before?
 8 A. Four or five.
 9 Q. When you woke up the next morning, Sunday morning
 10 were you feeling the effects of that alcohol at all?
 11 A. No.
 12 Q. When you and your sister left that morning, where
 13 were you going?
 14 A. We went to Super One to get a paper and headed home
 15 to my parents' home.
 16 Q. A Sunday paper?
 17 A. Yes.
 18 Q. Did you pick up anything else there at Super One?
 19 A. I believe we picked up some doughnuts, juice and a
 20 lottery ticket.
 21 Q. What was the doughnuts and juice for?
 22 A. We had them and then also taking them home to my
 23 parents and my little sister.
 24 Q. The Super One that you stopped at, is that the same
 25 Super One that your sister works at?

1 there was a vehicle following close behind you?
 2 MS. TAYLOR: Your Honor, I'm going to object and ask that
 3 the prosecutor not ask leading questions.
 4 THE COURT: Well, certainly sustain if there's a leading
 5 question.
 6 Q. (By Mr. Verharen) At some point did something
 7 catch your attention?
 8 A. Yes.
 9 Q. Can you tell us about where that was and what it
 10 was?
 11 A. We were coming out of the curves, the road goes
 12 through a lot of curves on Ramsey and it comes up a hill.
 13 Right as we got to the top of the hill we noticed somebody
 14 behind us.
 15 Q. Are we talking about Ramsey out in Athol?
 16 A. Yes.
 17 Q. And that's in Kootenai County, Idaho?
 18 A. Yes.
 19 Q. You have a diagram right behind you that's been
 20 marked Plaintiff's Exhibit 2. I'm going to give you a laser
 21 pointer, okay, and if you could point out on the diagram where
 22 it was when you first noticed this vehicle, I'd sure
 23 appreciate it. All you have to do is press that button right
 24 there and just point.
 25 A. Probably right up in here.

1 A. Yes.
 2 Q. So what time do you think you and your sister got
 3 back on the road after stopping at the grocery store?
 4 A. 11, 11:15.
 5 Q. Still in the morning?
 6 A. Yes.
 7 Q. Who is driving?
 8 A. Jovon.
 9 Q. And you're in the passenger seat?
 10 A. Yes.
 11 Q. Did you have a cell phone with you that day?
 12 A. Yes.
 13 Q. How long had you had that cell phone? Long time,
 14 short time?
 15 A. Long time.
 16 Q. Do you remember the way that you drove to your
 17 parents' house after leaving the grocery store that morning?
 18 A. Yes.
 19 Q. Can you tell us?
 20 A. Went down 95 to Garwood. Headed to Garwood over to
 21 Ramsey and then followed Ramsey out.
 22 Q. And so would it be safe to say then that Jovon was
 23 taking you home and picking her son up?
 24 A. Yes.
 25 Q. At some point did it come to your attention that

1 Q. Can you show us using that pointer there, I don't
 2 think it's on the map, but show us approximately where you and
 3 your sister were headed to your parents' house?
 4 A. Up over this way.
 5 Q. That's why West Wesson is?
 6 A. Yes.
 7 Q. Describe how it came to your attention that this
 8 vehicle was following you, please?
 9 A. We came up over the top, there's a hill and it
 10 flattens out, my sister asked if it looked like our neighbor.
 11 So I turned around and looked and said no.
 12 Q. What did you see when you turned around and looked?
 13 A. The grille of a SUV.
 14 Q. How close was the grille to the back end of your
 15 sister's Honda when you turned around and looked?
 16 A. Within feet.
 17 Q. Can you tell us what happened after that?
 18 A. After I turned and looked and I told her, no, it
 19 didn't look like our neighbor, turned around and there was a
 20 car coming towards us. As soon as the car passed us, the SUV
 21 pulled out to pass us and there was a stop sign coming ahead
 22 of us.
 23 Q. Could you see how close the SUV got to the car that
 24 passed you when he pulled out?
 25 A. Just right as he went by just enough room.

1 Q. Was it very close or not very close?
 2 A. Very close.
 3 Q. And so when this SUV passed you and your sister,
 4 what lane did the SUV travel in to do that?
 5 A. Opposite lane.
 6 Q. And at some point did SUV get in front of you and
 7 your sister?
 8 A. Yes.
 9 Q. Can you show us on the diagram where that happened?
 10 A. Right up in here.
 11 Q. You're pointing at the intersection of Brunner and
 12 Ramsey?
 13 A. Yes.
 14 Q. Is there a stop sign there at the end of Brunner?
 15 A. Yes.
 16 Q. How close about was the SUV from the stop sign when
 17 he got back into the lane that you and your sister were in?
 18 A. Right at the stop sign.
 19 Q. How close did the SUV get to the front of your
 20 vehicle when he did that?
 21 A. Within feet.
 22 Q. What happened after that?
 23 A. The SUV stopped, the driver come out, came back to
 24 our window, asked us what the F our problem was, what are
 25 doing, and told us to get out and take care of this problem

1 was doing this?
 2 A. Very mad.
 3 Q. You have said some things that he was telling you,
 4 would it be safe to say that these were curse words that he
 5 was yelling at you and your sister?
 6 A. Yes.
 7 Q. How many times did he ask you and your sister to get
 8 and settle this?
 9 A. Several, three or four.
 10 Q. When he was doing that was he doing anything with
 11 his body?
 12 A. Throwing his arms around.
 13 Q. How loud was he saying this?
 14 A. He was yelling at us.
 15 Q. Were there any other cars in the area?
 16 A. Not beside the one that had passed us going the
 17 opposite way.
 18 Q. That was the only car?
 19 A. Yes.
 20 Q. Did he end up doing anything as he was yelling and
 21 standing there by your sister's door?
 22 A. After we wouldn't get out, he punched the driver's
 23 side window.
 24 Q. Whereabouts, do you remember whereabouts he punched
 25 the window?

1 right here. And again repeated himself, get your f-ing ass
 2 out of the car, let's take care of this right here.
 3 Q. Let me slow you down a little bit. When he got out
 4 of the car and walked back to you, where was his vehicle
 5 parked and where were you and your sister?
 6 A. He was parked in the lane at the stop sign.
 7 Q. How far back from him were you and your sister in
 8 the Honda?
 9 A. Just right behind him.
 10 Q. When he got out of there were you able to see
 11 whether or not there was anybody else in the vehicle at that
 12 time?
 13 A. I didn't look to see.
 14 Q. Did he get out of the driver's side door, this
 15 person?
 16 A. Yes.
 17 Q. When he walked back, where was it that he was
 18 positioning himself when he was yelling at you and your
 19 sister?
 20 A. Driver's side door.
 21 Q. About how far away do you think he was?
 22 A. Two feet.
 23 Q. Were you able to see his face?
 24 A. Yes.
 25 Q. Can you describe the expression on his face when he

1 A. Middle, right in the middle of the window.
 2 Q. Were you able to see what the window did after he
 3 punched it?
 4 A. It was very close to breaking.
 5 Q. Why do you say that?
 6 A. Because when he hit it it just looked like it kind
 7 of wrinkled, like it was ready to break, just didn't.
 8 MS. TAYLOR: Your Honor, I'm going to move to strike,
 9 there's no foundation for ready to break part. I think she
 10 can describe what she saw.
 11 THE COURT: I'll allow it to stand, overruled.
 12 Q. (By Mr. Verharen) At some point did you and your
 13 sister lock the doors to the Honda?
 14 A. Yes.
 15 Q. When did you do that?
 16 A. As he was walking back to us.
 17 Q. After he punched the window and got done yelling
 18 at you and your sister, did you decide to get on the phone
 19 with 911?
 20 A. Yes.
 21 Q. Can you tell us about when it was that you decided
 22 to do this, what was this person doing?
 23 A. It was after he punched our window.
 24 Q. And your cell phone, did you have a purse with you?
 25 A. No, just carried my cell phone.

1 Q. You had it in your hand?
 2 A. It was in the car, probably beside me.
 3 Q. The person that punched the driver side door or
 4 window of the car and was yelling at you and your sister, is
 5 he here today?
 6 A. Yes.
 7 Q. Would you please point him out and describe where
 8 he's seated and tell us what he's wearing?
 9 A. Sitting right here, gray and white striped shirt.
 10 Q. Thank you. What happened after he got done punching
 11 the window and yelling at you and your sister?
 12 A. Got back in his vehicle and took off.
 13 Q. Can you show us, using the pointer there, which way
 14 he went?
 15 A. He went this way.
 16 Q. So he hung a right turn there at Brunner Road?
 17 A. Yes.
 18 Q. At some point did you and your sister decide to
 19 follow him?
 20 A. Yes.
 21 Q. Why is that?
 22 A. Because there was no license plates on his vehicle,
 23 and so we were talking to 911 telling them describing what was
 24 happening and following him.
 25 Q. At some point there on Brunner Road did the SUV that

1 sister fast or slow?
 2 A. Fast.
 3 Q. What happened?
 4 A. He stopped within a foot, foot and a half of her
 5 front bumper.
 6 Q. Then what took place?
 7 A. Then he took off again.
 8 Q. Can you tell us the route that he it took?
 9 A. He went up here and turned on this road.
 10 Q. He hung a left there off Brunner onto Weir?
 11 A. Yes.
 12 Q. Did you and your sister continue to follow him?
 13 A. Yes.
 14 Q. You were on the phone with 911 at that point?
 15 A. Yes.
 16 Q. Describe what happened as you went up Weir Road,
 17 please?
 18 A. There were some people walking on the road, and he
 19 flew by them, went all the way up Weir to Seasons.
 20 Q. Can you show us where Seasons is, please, using your
 21 pointer?
 22 A. Right here.
 23 Q. What happened when he got to Seasons?
 24 A. Took a right.
 25 Q. So he was going eastbound again on Seasons?

1 the defendant was driving stop?
 2 A. Yes.
 3 Q. Where did it stop, you can use your pointer, if you
 4 want?
 5 A. In here.
 6 Q. How did it stop? Was it a quick stop or a long
 7 stop?
 8 A. A quick stop.
 9 Q. Whereabouts in the road there did the Blazer stop?
 10 A. In our driving lane headed east.
 11 Q. So it would be in the eastbound lane?
 12 A. Yes.
 13 Q. Were you and your sister behind him?
 14 A. Yes.
 15 Q. Did you and your sister also stop there behind him?
 16 A. Yes.
 17 Q. What happened after the Blazer stopped in the middle
 18 of the road?
 19 A. He put it in reverse and came backwards.
 20 Q. Did he come backwards fast or slow?
 21 MS. TAYLOR: Your Honor, I'm going to object again to the
 22 leading.
 23 THE COURT: I don't think this last question was leading,
 24 so I'll overrule.
 25 Q. (By Mr. Verharen) Did he come back at you and your

1 A. Yes.
 2 Q. And you and your sister continued to follow him?
 3 A. Yes.
 4 Q. What happened up on Seasons Road?
 5 A. It was snowy and there was a patch on the road that
 6 didn't get plowed all the way, the vehicle hit that patch,
 7 lost control and was swerving all over the road, and then he
 8 regained control.
 9 Q. After the defendant regained control of this SUV,
 10 what did he do?
 11 A. He drove up to a little, it's a pullout, and pulled
 12 in there and turned around.
 13 Q. Did a U-turn in the road?
 14 A. No, he pulled in and then backed out.
 15 Q. Okay. What did he do after he pulled in and then
 16 backed out?
 17 A. Came toward me and my sister in our lane.
 18 Q. Which lane were you and your sister in on Seasons
 19 Road?
 20 A. Our lane going east.
 21 Q. And so describe what the defendant did then in his
 22 vehicle on Seasons Road?
 23 A. He came towards us, and then probably within about
 24 10 feet before us he pulled back to his own lane, went by us
 25 flipping us off, making the mouth gestures as fuck you.

1 Q. As he was driving head-on towards you and your
 2 sister in the wrong lane, was he going fast or slow?
 3 A. Fast.
 4 Q. And when he pulled back into the correct lane after
 5 he went around the front of the vehicle that you and your
 6 sister were in, I think you said he was mouthing some words,
 7 could you see the expression on his face?
 8 A. Just mean.
 9 Q. What happened after that?
 10 A. After he went around us we stopped, turned around
 11 also and continued back the way we had came from.
 12 Q. Can you show us using your pointer?
 13 A. We turned around over here and then we came back
 14 this way.
 15 Q. Were you able to see which way the defendant went in
 16 his SUV?
 17 A. Yes, he turned left.
 18 Q. So he went southbound on Weir Road there?
 19 A. Yes.
 20 Q. Can you show us using the pointer?
 21 A. Came up here and right here, came down this way.
 22 Q. Tell us what happened after that?
 23 A. We kept our distance. He was quite a ways ahead of
 24 us. We seen him come up to Weir and Brunner and took a right.
 25 Q. Can you show us using your pointer?

1 A. He came up here and turned this way.
 2 Q. And he took a right there on Brunner going west?
 3 A. Yes.
 4 Q. What happened after that?
 5 A. By the time we reached the corner of Weir and
 6 Brunner, we got up there and could not see him anymore.
 7 Q. Can you tell us, using your pointer, what's just
 8 south of Brunner there, that big open space, what that is?
 9 A. This right here?
 10 Q. Yes, what is that?
 11 A. It's a hay field.
 12 Q. Is it a short hay field that you can see over?
 13 A. Yes.
 14 Q. From the corner there of Weir Road and Brunner Road
 15 can you see all the way over to Ramsey Road?
 16 A. Yes.
 17 Q. After you and your sister got down then to the
 18 intersection of Brunner off Weir, what did you do?
 19 A. We realized that we can't see him anymore. All this
 20 time still on the phone with dispatch. We looked all the way
 21 down as far as you could see down Brunner where it turns into
 22 Ramsey, looked across the hay field to see Ramsey headed to
 23 Coeur d'Alene, and there was nothing.
 24 Q. Did you come to a conclusion at that point?
 25 A. Yes.

1 Q. What was that?
 2 A. That he had to turn off on a road somewhere between
 3 Weir and Brunner and Ramsey.
 4 Q. Can you show us using your pointer?
 5 A. He had to turn off somewhere in this area right
 6 here.
 7 Q. What is that area there that you're pointing to?
 8 A. Houses.
 9 Q. So then what did you and your sister do after that?
 10 A. We drove up around the corner on Ramsey just to see
 11 for any reason if we might see anything, because Ramsey goes
 12 up and takes a turn, it's another long stretch.
 13 Q. Can you show us using your pointer?
 14 A. We came up here, came on this corner and then you
 15 can see all way down quite a ways down this way.
 16 Q. When you and your sister went there, did you see
 17 anything?
 18 A. No.
 19 Q. Then what did you and your sister do?
 20 A. The 911 dispatcher told me that she wanted us to
 21 wait at the corner, at first I believe she said the corner of
 22 Ramsey and Brunner, and I told her where we were if that was
 23 fine. She was sort of hesitant on it, so I said we could go
 24 back to the corner of Brunner and Ramsey, that was fine.
 25 Q. Can you show us where you and your sister went?

1 A. We went right here.
 2 Q. Did you park the car off the road?
 3 A. Yes.
 4 Q. Is that the same place where the defendant punched
 5 the window of your sister's car?
 6 A. Yes.
 7 Q. Tell us what happened after that?
 8 A. We were sitting there and my parents were expecting
 9 us to be home so that my sister could pick up her son, so I
 10 called them and gave them a little brief what happened that we
 11 weren't going to be there when they were expecting us to be
 12 there.
 13 Q. So you got off the phone with 911?
 14 A. Yes. Then I got ahold of my parents and we sat
 15 there. Because the 911 dispatcher said to meet the officer
 16 there, so we were just waiting for him.
 17 Q. And so right after you got done talking to 911 you
 18 talked to your parents?
 19 A. Yes.
 20 Q. Who got there first, a sheriff's deputy or your
 21 parents?
 22 A. Parents.
 23 Q. How long do you think it was after you parked there
 24 before your parents got there?
 25 A. About 15 minutes.

1 Q. Did you tell your parents to come there?
 2 A. No.
 3 Q. Were you surprised when they showed up?
 4 A. Yeah.
 5 Q. Do you recall what they were driving?
 6 A. They were driving my mom's Subaru.
 7 Q. How long had your family had that Subaru?
 8 A. At least a year.
 9 Q. Who was driving?
 10 A. My mom.
 11 Q. Do you recall who was in the passenger seat?
 12 A. Yes, my father.
 13 Q. So it was just those two?
 14 A. Yes.
 15 Q. Did your mom and your dad come up to where you and
 16 your sister were parked there at the intersection?
 17 A. Yes.
 18 Q. What happened at that point?
 19 A. They asked us what was going on at that point
 20 because we were just sitting there. We told them we were
 21 waiting for an officer. And again he kind of asked what was
 22 going on, and we told him.
 23 Q. Who asked?
 24 A. My dad.
 25 Q. Okay.

1 A. So we went ahead and told him what was going on.
 2 Q. Did you relay information about where you thought
 3 the Blazer might be?
 4 A. Yeah, because my dad asked if we seen where it went
 5 to, and we told him by the time we got to Weir and Brunner we
 6 could not see it anymore. We told him we went down on Ramsey
 7 and looked around the corner and there was nothing.
 8 Q. So after you had that conversation with your
 9 parents, what could you see your parents do?
 10 A. My dad, or my mom turned around in the road and they
 11 drove down towards Weir.
 12 Q. Can you show us using your pointer?
 13 A. They drove back down this way.
 14 Q. Did you see them at some point stop or did you lose
 15 sight of them?
 16 A. We could see them the whole way.
 17 Q. Describe where you saw them go, please.
 18 A. They were just driving down this way, turned
 19 around. They were driving and then all of a sudden -- while
 20 they had left, the sheriff pulled up, so we were also
 21 listening to what the sheriff had to say, and after the
 22 sheriff left that's when we seen them go to turn around.
 23 Q. So at some point you saw them go to the intersection
 24 of Weir and Brunner or around that area?
 25 A. Yes.

1 Q. And then after the deputy left you saw them come
 2 back your way?
 3 A. Yes.
 4 Q. Let's talk about when the deputy came, how long do
 5 you think it was after you got there that the deputy came?
 6 A. Half hour.
 7 Q. What happened when the deputy got there?
 8 A. He came up to us and asked us what was going on,
 9 told him the story. He asked us to pull our car to the other
 10 side of the road, because when he had pulled up he was on his
 11 side of the road just headed north. And so he wanted us to
 12 pull behind him so we weren't taking up both sides of the
 13 road. So we did that. And then after we stopped, he brought
 14 us back police statements and asked us if we could please fill
 15 these out.
 16 Q. Witness statement forms?
 17 A. Yes.
 18 Q. And he gave those to you and your sister?
 19 A. Yes.
 20 Q. Can you tell us what happened after that?
 21 A. The officer asked us where, kind of where we thought
 22 he had went. We told him last we seen him he came up Weir,
 23 took a right. By the time we got to Weir he was not visible
 24 anywhere around. And so we told the officer that he was
 25 between Ramsey and Weir.

1 Q. Can you tell us what happened after that?
 2 A. Officer went up and took a left, which was opposite
 3 of what we had said.
 4 Q. Can you show us on the pointer?
 5 A. He turned this way.
 6 Q. Did you see where he went?
 7 A. He went up around the corner or towards the corner.
 8 Q. Can you show us using the pointer?
 9 A. This way.
 10 Q. Let's go back to where you saw your parents coming
 11 toward you from down by Weir and Brunner. Can you describe
 12 what you saw happened down the road there after the deputy
 13 left?
 14 A. We start filling out our police reports. Just
 15 looked up and looked towards the way my parents were and we
 16 seen the SUV reappear.
 17 Q. Can you show us using your pointer where you first
 18 saw it?
 19 A. Pulling out of one of these, I believe it's this
 20 driveway right here.
 21 Q. Which way did it come, which way did it drive to
 22 after it pulled out of that road?
 23 A. Turned to the right.
 24 Q. So it was coming towards you and your sister?
 25 A. Yes.

1 Q. How long after the deputy left do you think it was
2 that the Blazer came out of that driveway?
3 A. Within minutes.
4 Q. Tell us what happened after that?
5 A. Came down to Ramsey and Brunner and turned left.
6 Q. Can you to show us?
7 A. Came over and turned down this way. We were still
8 parked on the right side of the road. He cut the corner, came
9 around, flipped us off again, same thing, fuck you, and took
10 off.
11 Q. Were you able to see his facial expression then as
12 he came around the corner and flipped you and your sister off?
13 A. Yes.
14 Q. Can you tell us that expression?
15 A. Just as he was going by.
16 Q. How close do you think he got to you and your sister
17 as he made the turn?
18 A. Within five feet.
19 Q. Tell us what happened after that?
20 A. My parents had also seen him come out, so they
21 turned around and were headed back towards us. Right as soon
22 as I seen him and he passed us I picked up my phone because
23 the dispatcher said -- the cop said if we see come back out
24 make sure and call dispatch so they can let him know, so I did
25 that.

1 Q. So you got on the phone with 911 a second time?
2 A. Yes.
3 Q. About how long do you think it was from the time
4 that you hung up the phone with the first 911 call to the time
5 it was that you called again, just approximately?
6 A. 35, 40 minutes.
7 Q. So as you got on the phone the second time with 911
8 can you tell us what you and your sister were doing?
9 A. As we were talking to him we were turning around
10 headed back also south on Ramsey.
11 Q. Can you show us on that diagram?
12 A. Headed back this way.
13 Q. Describe what happened as you and your sister
14 followed that SUV down Ramsey?
15 A. Picked up high speeds. My parents were behind us.
16 Q. Were your parents keeping up with you?
17 A. Yes.
18 Q. How fast were you and your sister going down Ramsey
19 Road?
20 A. We reached, I'd say, about at least 80.
21 Q. When you were going down Ramsey Road there at that
22 speed were you able to see the SUV in front of you?
23 A. For the most part, some of the corners you couldn't
24 see around.
25 Q. How fast was the SUV going?

1 A. Fast.
2 MS. TAYLOR: Your Honor, I'm going to object, lacks
3 foundation.
4 THE COURT: Sustained.
5 Q. (By Mr. Verharen) Were you able to keep up with
6 the SUV?
7 A. We weren't trying to keep up, we were just keeping
8 eye distance.
9 Q. What was the reason that you and your sister were
10 following the SUV the second time?
11 A. Then again he didn't have any plates, we were
12 wanting to see where he was headed to because the officer was
13 out in the area within, couldn't have been that far from us,
14 and waiting for him to come up and take over in front of us
15 and take care of it.
16 Q. Did you intend to try to confront the driver of the
17 Blazer, the defendant here?
18 A. No.
19 Q. Had you and your sister been able to see where he
20 went, what would you have done?
21 A. Will you say that again?
22 Q. Had you and your sister been able to see him go up a
23 driveway or something like that, what would you and her have
24 done?
25 MS. TAYLOR: Your Honor, I'm going to object,

1 speculation.
2 THE COURT: She certainly can't speculate what her sister
3 would have done, but she can give the answer what her
4 intentions were.
5 A. I would have waited at the driveway and told
6 officers he turned up that driveway.
7 Q. (By Mr. Verharen) Were you able to talk to your mom
8 and dad who were following behind you?
9 A. No.
10 Q. Why was that?
11 A. They had no cell phones.
12 Q. Describe what happened as you got down to
13 Scarcello Road there?
14 A. The vehicle took a right.
15 Q. Can you show us?
16 A. Down to the right this way.
17 Q. Tell us what happened after that?
18 A. Continued down Scarcello, came to these, this curve
19 in the road here, came out to the other side and the vehicle
20 was turning around.
21 Q. As you and your sister got around the corner there,
22 what could you see the SUV doing?
23 A. It was pulling, it hit a snowbank and was starting
24 to back up.
25 Q. How was it backing up, do you remember? What lane

1 along, what's the next thing you remember?
 2 A. Just seeing her go down.
 3 Q. Do you remember how she went down?
 4 A. She was pushed, she didn't just fall straight down,
 5 she was pushed over, like her side to like her back. She went
 6 down like this.
 7 Q. And then what do you remember seeing happen?
 8 A. I remember seeing her get run over and the SUV
 9 leaving.
 10 Q. As you watched the Blazer come around the corner of
 11 the Honda and go to your mom and hit your mom, could you hear
 12 the sound of the Blazer?
 13 A. Yes.
 14 Q. Tell us about that, please?
 15 A. Accelerating.
 16 Q. As the Blazer hit your mom and ran over your mom,
 17 could you hear the sound of the Blazer's engine?
 18 A. Still accelerating.
 19 Q. Was there ever any break in the acceleration as that
 20 Blazer got to your mom and then ran over your mom?
 21 A. No.
 22 Q. After the Blazer ran over your mom, what did it do?
 23 A. Just continued away.
 24 Q. Did you hear any break in the acceleration as it
 25 continued away?

1 A. (Witness shook head negatively.)
 2 Q. No?
 3 A. No.
 4 Q. At some point when this was happening when the
 5 vehicle you were in was struck and you watched your mom get
 6 run over, were you able to see the driver of the Blazer?
 7 A. Yes.
 8 Q. At what point was that?
 9 A. I could see him as the Blazer, the door came visible
 10 from behind the Honda.
 11 Q. When you were at the door of the Honda looking up?
 12 A. Yes.
 13 Q. Is the driver of the Blazer here today?
 14 A. Yes.
 15 Q. Please point him out, describe where he's seated,
 16 tell us what he's wearing?
 17 A. Seated to the left of me, blue, light blue-gray
 18 shirt, striped.
 19 Q. Person you previously identified?
 20 A. Yes.
 21 Q. As the Blazer sped away, tell us what happened?
 22 A. As he was leaving I heard gunshots, and then took
 23 off running up to my mom.
 24 Q. Then what happened?
 25 A. Just looked at her and there was a big trail of

1 blood just coming down her side from like the underside of
 2 her.
 3 Q. Was your mom moving at all or anything like that?
 4 A. No.
 5 Q. What's the next thing you remember happening?
 6 A. After the SUV was gone, then the next thing I
 7 remember was a sheriff finally coming.
 8 Q. Do you remember what your dad and your sister were
 9 doing before the sheriff's deputy got there?
 10 A. We were all standing around my mom, we all had gone
 11 to my mom.
 12 Q. Was your mom moving at all at that time?
 13 A. No.
 14 Q. Could you see whether or not she was breathing?
 15 A. No.
 16 Q. Were you still on the phone with 911?
 17 A. Yes.
 18 Q. Do you remember what you were telling 911 at that
 19 time?
 20 A. That he had hit and killed my mom.
 21 Q. How long do you think it was before the sheriff's
 22 deputy got there after Mr. Ellington struck and ran over your
 23 mom?
 24 A. 30, 45 seconds. I'm not exactly sure on the time.
 25 Q. Can you tell us what you remember happening after
 1 that, after the sheriff's deputy got there?
 2 A. He just got out of his car, came up to my mom, tried
 3 to see if she was breathing, and then I turned around.
 4 Q. At some point did ambulances come?
 5 A. Yes.
 6 Q. And more police officers?
 7 A. Yes.
 8 Q. Later on when you were there were you taken
 9 somewhere else?
 10 A. Yes.
 11 Q. Can you tell us about that, please?
 12 A. I was taken to the Rathdrum Police department.
 13 Q. What happened there?
 14 A. They had asked and recorded what had went on.
 15 Q. Did you talk to a detective there?
 16 A. Yes.
 17 Q. Do you remember who that was?
 18 A. Yes.
 19 Q. Who was it?
 20 A. There was a couple different guys there. Some of
 21 them had came from the sheriff's department and we had talked
 22 to, we ended up talking to a couple different ones.
 23 Q. At some point were you put in a room along with a
 24 detective?
 25 A. Yes.

1 Q. And that detective asked you what happened?
 2 A. Yes.
 3 Q. Joleen, what I would like you to do, I know you
 4 showed us on that photograph where you think it was that your
 5 mom was hit by Mr. Ellington. I want to show you a diagram
 6 here, it's been marked as 46-C. On this diagram I would like
 7 you to put the location where you think, where you remember
 8 seeing the Blazer strike your mom, okay?
 9 A. Okay.
 10 MS. TAYLOR: Your Honor, may I approach?
 11 THE COURT: Please.
 12 A. This is turned around, correct? Okay, no, I see,
 13 sorry.
 14 Q. You can take a moment, you have seen that diagram
 15 before?
 16 A. Yes.
 17 Q. Take a moment and get yourself orientated on that
 18 diagram. Then what I would like you to do is put the location
 19 where you saw your mom get struck and then maybe you can make
 20 an X there, and by your X if you could write your name.
 21 A. (Complied).
 22 Q. Thank you. Joleen, let me show you what has been
 23 marked Plaintiff's 151, it's a CD, do you recognize it?
 24 A. Yes.
 25 Q. How do you recognize it?

1 A. Because I initialed it.
 2 Q. Are your initials on the face of that?
 3 A. Yes.
 4 Q. What is Plaintiff's 151?
 5 A. It's 911 tapes.
 6 Q. Is it both the first call you placed to the 911 as
 7 well as the second call?
 8 A. Yes.
 9 Q. Have you listened to that all the way through?
 10 A. Yes.
 11 Q. Is that an accurate recording of the two 911 calls
 12 that you made that particular day?
 13 A. Yes.
 14 MR. VERHAREN: Move to admit 151.
 15 MS. TAYLOR: Your Honor, we would like to listen to it
 16 prior to stipulating.
 17 THE COURT: That hasn't been accomplished?
 18 MS. TAYLOR: There are two versions of this, the regular
 19 recording and the digital according. I think this is the
 20 digital recording. I just want to be sure what we are hearing
 21 before it's presented to the jury.
 22 MR. VERHAREN: It's the digital recording.
 23 THE COURT: Are you going to be asking to publish it at
 24 this point in time?
 25 MR. VERHAREN: I am.

1 THE COURT: How long is it?
 2 MR. VERHAREN: Both calls together I would say
 3 12 minutes.
 4 THE COURT: If we are about to publish it, then let's
 5 make sure we have no discrepancies that you want to raise.
 6 I'll give you a chance to review it. Do you have a method of
 7 doing that?
 8 MS. TAYLOR: Not with me right here.
 9 THE COURT: I'm sure Mr. Verharen can supply his source.
 10 We'll have the jury back for a few minutes. Again I'd
 11 Admonish the jury not to discuss the matter among yourselves,
 12 nor with others, nor shall you form or express any opinion
 13 about it until it is finally submitted to you. So we'll take
 14 about 15 minutes and then we'll be back.
 15 And you can step down for a moment, thank you.
 16 (Recess)
 17 (WITHOUT THE JURY PRESENT)
 18 THE COURT: Counsel, during the break, counsel had an
 19 opportunity to review submission of 157. Basically to
 20 expedite matters, it's my understanding there are some
 21 concerns about whether or not this version of the 911 call is
 22 as clear as the copy that's in the possession of the defense.
 23 And I think we agreed, counsel for the state and
 24 counsel for the defense, that what we can do is play both
 25 versions in the event that there are certain clarity problems

1 with one that can be covered by the other, then we can make
 2 sure that the jury has an opportunity to fully hear the 911
 3 calls which are, certainly by virtue of both parties'
 4 comments, are very important in this case. Is that agreeable
 5 with the state?
 6 MR. VERHAREN: Yes, sir.
 7 THE COURT: Is that agreeable with the defense?
 8 MS. TAYLOR: Yes, Your Honor.
 9 THE COURT: I understand you need to bring your player in
 10 for that purpose.
 11 MS. TAYLOR: We will.
 12 MR. VERHAREN: And it's 151.
 13 THE COURT: What did I call it, 157?
 14 MR. VERHAREN: Yes. Yes, probably my bad handwriting.
 15 THE COURT: 157, thank you. Anything else before we
 16 bring in the jury?
 17 MR. VERHAREN: No, Judge.
 18 THE COURT: With that let's bring our jury in.
 19 (Concludes without the jury present)
 20 (JURY IS PRESENT)
 21 THE COURT: Thank you. Ladies and gentlemen, we are
 22 going ahead and admit exhibit 151. We have had some
 23 discussions and we have tried to basically copy the original
 24 tape of the call so that it can be a little clearer, and
 25 there's a couple of versions on disks. What we thought we

1 would do is play this version and play the other version
2 because there may be, because of maybe the machine or how it
3 was copied, there may be some discrepancy and there may be
4 some things that are clearer on one disk than the other disk,
5 and we want to make sure that you had an opportunity to hear
6 the information.

7 So we will go ahead and admit exhibit 151, and then
8 we'll probably have later on a similar version except with a
9 little bit disk and mechanics, I guess, connected to it. With
10 that we will go ahead and admit exhibit 151.

11 Was it your desire to publish that at this point,
12 Mr. Verharen?

13 MR. VERHAREN: Yes, sir.

14 THE COURT: I'll let you do the honors.

15 Ms. Taylor and Mr. Verharen and the Court agreed the
16 reporter does not have to report the playing of this exhibit.

17 (Plaintiff's exhibit 151, a digital recording of a
18 911 call, was played at this) time.

19 THE COURT: Mr. Verharen, if you will hand me the
20 exhibit, I'll make sure the clerk marks it admitted.

21 MR. VERHAREN: Yes, sir.

22 THE COURT: Thank you, sir.

23 All right, continue, Mr. Verharen.

24 MR. VERHAREN: I don't have any other questions, Judge.

25 THE COURT: Cross-examination, Miss Taylor.

1 MS. TAYLOR: Thank you, Judge.

2 CROSS-EXAMINATION

3 BY MS. TAYLOR:

4 Q. Miss Larsen, is it okay to continue now or do you
5 need a few minutes before we get going?

6 A. I'm fine.

7 Q. I want to go ahead and start right at the end of
8 that tape that we just heard. Did you hear a man's voice, is
9 that your dad you were talking to at the end of that tape?

10 A. Yes.

11 Q. I heard your voice say: Dad, give me that. What
12 were you talking about?

13 A. He was holding his gun in his hand.

14 Q. Was he pointing it down the road?

15 A. When I was talking to him?

16 Q. Yes, when you were saying give me that.

17 A. I don't believe so, he just had it. We were all
18 really stirred up, and I don't know, I just told him to give
19 it to me.

20 Q. Did he give it to you?

21 A. No, he went and put it on the seat of my mom's car.

22 Q. I also thought I heard your voice say: Dad, push.

23 What were you asking him to push?

24 A. I don't remember hearing, I don't know.

25 Q. Did you and your dad kind of move your mom while she

1 was on the road there?

2 A. The only thing I remember is just the hair, because
3 she had hair all across her face and we went like this just so
4 we could see her face.

5 Q. And then right at the end I heard your dad ask you
6 where he's at, did you tell him where Mr. Ellington had gone?

7 A. He was asking me where the cop was.

8 Q. Okay, I'm sorry. I want to move kind of back to the
9 beginning now. You indicated that you attended a New Year's
10 Eve party with your sister Jovon, correct?

11 A. Yes.

12 Q. How many kids were at that party or young people?

13 A. People were in and out, and I don't know a number.

14 Q. Did you stay at that same party all evening, that
15 New Year's evening?

16 A. Yes.

17 Q. You testified you got home about 3:30 in the morning
18 from that party?

19 A. 3:30.

20 Q. How did you get home?

21 A. A really good friend of ours who had not been
22 drinking that night took us home.

23 Q. And that's because both you and your sister had had
24 some beers or something?

25 A. My sister hadn't had very many, but she had still

1 been drinking and this friend of ours had not.

2 Q. What time did you go to bed that morning when you
3 got home?

4 A. Just right when we got home.

5 Q. Do you remember what time you woke up on
6 January 1st?

7 A. Between 10:30 and 11.

8 Q. Do you recall getting a telephone call at 7:49 from
9 Seth Smith on New Year's morning?

10 A. No.

11 Q. Do you recall getting a call from your parents' home
12 a little at after 8 on New Year's morning?

13 A. I have no idea.

14 Q. Did you call your boyfriend Seth Smith at 7, I'm
15 trying to get the time.

16 MR. VERHAREN: Objection, relevance.

17 THE COURT: I'll let you finish the question first.

18 Q. (By Ms. Taylor) 7:46, did you call him at 7:46?

19 MR. VERHAREN: Objection, relevance.

20 MS. TAYLOR: Your Honor, I'm trying to understand how
21 much sleep she had.

22 THE COURT: That's fine, I'll overrule. I don't think
23 her discussion with her boyfriend is relevant, I'll agree.
24 I'll overrule the objection.

25 Q. (By Ms. Taylor) Do you recall making the telephone

1 call to him at 7:46 on New Year's morning?

2 A. I know I talked to him before I left my sister's
3 house, I couldn't tell you exactly what time it was.

4 Q. And then how about your parents at 8:01?

5 A. I believe they might have called me.

6 Q. And then your boyfriend again at 8:01 and 8:07 and
7 8:08? Do you recall a number of phone calls that morning
8 beginning fairly early in the morning?

9 A. I remember getting phone calls, I couldn't tell you
10 how many.

11 Q. So you didn't sleep until 10:30 in the morning?

12 A. I wasn't wide awake. If my phone wakes me up,
13 usually I answer it depending on who it is.

14 Q. It would be fair then to say that you had disturbed
15 sleep from 7:46 until 10:16, a number of about 13, 14
16 telephone calls, is that fair to say?

17 A. I wouldn't say that I answered them all, no.

18 Q. If you talk on them it deducts minutes and units
19 from your cell phone plan; is that correct?

20 A. Yes.

21 Q. So if there is a registered number, let's say 68
22 that would be some 68 units, I'm not saying 68 minutes, but 68
23 units deducted, correct?

24 A. Say that again?

25 Q. If you talk on the phone it deducts from your plan,

1 correct?

2 A. Yes.

3 Q. So if there's something listed, then that means that
4 you talked on the phone, correct, in the usage area?

5 A. Yes.

6 Q. And it would register a zero if you didn't answer
7 it, correct?

8 A. Yeah.

9 Q. So your sleep was pretty disrupted then from 7:46
10 until 10:30 in the amount of about 13 or 14 telephone calls,
11 15 maybe, would you agree with that?

12 A. I don't know how many there were.

13 Q. So you didn't have a whole lot of sleep that night,
14 did you?

15 A. I felt totally fine when I woke up, I didn't feel
16 like I was still tired.

17 Q. Did you still feel drunk?

18 A. No.

19 Q. From 3:30 to 7:46, four hours of sleep after a night
20 of drinking, you didn't feel the effects of that alcohol at
21 all?

22 A. Well, I didn't drink them all at one time, they were
23 spread out through the night. It's not like I had them one
24 right after another continuously.

25 Q. When you were driving on Ramsey Road, I think the

1 prosecutor had you point to Ramsey Road over there, and you
2 showed us where you first saw the Blazer. In all the other
3 hearings that we have had you called it a Blazer, but today
4 you're calling it an SUV, correct?

5 A. Yeah.

6 Q. Why is that?

7 A. Just what I say, same thing.

8 Q. Okay, so we're referring to this Blazer?

9 A. Yes.

10 Q. You pointed out where you first noticed it, did your
11 sister notice that vehicle first?

12 A. Yes.

13 Q. And when you looked at it, you thought it was the
14 neighbor?

15 A. Yeah, they have one exactly that looks just like it.

16 Q. Which neighbor is that?

17 A. Last name of Peck.

18 Q. He's kind of known in the neighborhood as a bad
19 driver?

20 A. Just speedy.

21 Q. Drives way too fast?

22 A. Yeah.

23 Q. In your neighborhood you and other neighbors
24 sometimes when you're in your cars maybe drive at each other
25 because you kind of live out in the country, correct?

1 A. No.

2 Q. Don't play any car games with anybody out in that
3 neighborhood?

4 MR. VERHAREN: Objection, asked and answered.

5 THE COURT: Sustained.

6 Q. (By Ms. Taylor) How about flipping each other off,
7 just you and the neighbors and other people and the neighbors,
8 just kind of a common thing in your neighborhood as you drive
9 by?

10 A. No.

11 Q. Never done that?

12 MR. VERHAREN: Objection, asked and answered.

13 THE COURT: Sustained.

14 Q. (By Ms. Taylor) Have you ever flipped anybody off
15 while you've been driving.

16 MR. VERHAREN: Objection, relevance.

17 THE COURT: I'll overrule, you can answer the question.

18 A. I can't say I've never done it, but it's not like
19 everybody I see on my driveway that's what I do.

20 Q. You have, though, in the past flipped people off

21 A. Yeah, I can't say I never have.

22 Q. On this occasion you and your sister flipped the
23 driver of that Blazer off when you thought it was your
24 neighbor, didn't you?

25 A. No.

1 Q. You and your sister when you were in the Honda drove
2 slow to see if it was the neighbor, correct?
3 A. No.
4 Q. You didn't slow down?
5 A. No.
6 Q. And you and your sister, when the Blazer first tried
7 to pass you, you pulled out and cut him off, didn't you?
8 A. No.
9 Q. What did you do to start this?
10 A. We were driving home.
11 Q. Your testimony is absolutely nothing, you did
12 absolutely nothing?
13 A. No, we were driving home, noticed him, my sister
14 noticed him in the mirror. I turned around, said, no, not the
15 neighbor, continued on.
16 Q. So your testimony is you did nothing to cause him to
17 get out of his car?
18 MR. VERHAREN: Objection, asked and answered.
19 THE COURT: Sustained.
20 Q. (By Ms. Taylor) When the Blazer went to go around
21 you and was able to pass, he was at the stop sign when it
22 stopped, correct?
23 A. Yes.
24 Q. Tell me how close to the window did he get of the
25 Honda?

1 A. When he was standing outside?
2 Q. Yeah.
3 A. Foot and a half, two feet, he was just right outside
4 the door.
5 Q. Did he try to open that door at all?
6 A. I don't recall.
7 Q. And you were seated in the Honda, correct?
8 A. Yes.
9 Q. A Honda is kind of low to the ground, correct?
10 A. Yes.
11 Q. How is it that you were able to see the expression
12 on the person driving the Blazer's face then if you're seated
13 in that Honda and you're right next to that car?
14 A. When he was right outside of our door?
15 Q. Yes.
16 A. He was right there at the door.
17 Q. Standing right next to it?
18 A. Yeah.
19 Q. Did he gesture like what's going on?
20 A. Yeah, what's going on, what the fuck's your problem,
21 get out.
22 Q. Let me ask you about that. We just heard the 911
23 tape. I think I heard on that 911 tape you saying that he
24 cussed at you and punched your sister's window, correct?
25 A. Yes.

1 Q. You didn't tell the 911 operator anything about
2 asking you to get out of the car, correct?
3 A. I believe there was something on there that says
4 that he was wanting -- he had said about us getting out.
5 Q. Or did that come later that you said that?
6 A. Will you re-ask that?
7 Q. I'll just move on to another question right now. Is
8 the fact that there wasn't a license plate on the back of that
9 vehicle, is that the only reason you were following?
10 A. So we could let the officer know where he was going
11 because he we had no way to identify to the officer who this
12 belonged to so that they could track it themselves.
13 Q. You didn't think given a vehicle description and a
14 general location area was enough?
15 A. No, because if we have a neighbor that has, you
16 know, a vehicle that looks pretty similar, that's two in that
17 vicinity.
18 Q. Neighbor's vehicle has a license plate, though,
19 right?
20 A. I don't know.
21 Q. Do you recall whose idea it was to call your
22 parents?
23 A. I don't know which one of us.
24 Q. Do you recall while you were on with 911 that your
25 sister said to you let's call dad, do you recall her saying

1 that?
2 A. No.
3 Q. Let's talk about when you turned onto Brunner Road.
4 Kind of rolled through that stop sign, you didn't really stop
5 at that stop sign, you guys just kind of followed Mr.
6 Ellington on through, correct?
7 A. No.
8 Q. You stopped a full stop at the stop sign?
9 A. To make sure nobody was coming, yes.
10 Q. Sure you didn't roll through?
11 MR. VERHAREN: Objection, asked and answered.
12 THE COURT: Sustained.
13 Q. (By Ms. Taylor) Do you recall testifying at a
14 previous hearing in this case?
15 A. Yes.
16 Q. Do you recall telling Mr. Adams that you kind of
17 slowed down and then rolled through?
18 A. No.
19 Q. When you got on Brunner you got fairly close to the
20 back of the Blazer, correct?
21 A. No.
22 Q. How many car lengths were you behind that Blazer?
23 A. As we were moving down the road?
24 Q. Yes.
25 A. I couldn't give you the exact amount, we weren't

1 right behind him. Giving him decent space.

2 Q. Can you estimate in this courtroom, tell me what
3 decent space is?

4 A. There was different times we were different lengths.

5 Q. Let's just stay with Brunner, this first time on
6 Brunner Road?

7 A. When he first took off, he was going, you know, we
8 haven't taken off yet if we're stopping at the stop sign and
9 we take off. He slows down, and then when he stops, comes
10 back at us, we're not always the same distance behind him.

11 Q. Kind of had to speed up to catch up with him on
12 Brunner Road?

13 A. We weren't trying to catch him.

14 Q. After he went back forward on Brunner Road, you stay
15 in behind?

16 A. Yes.

17 Q. And then onto Weir Road as he sped up, you sped up,
18 correct?

19 A. Yes.

20 Q. Same thing on Seasons when he turned onto Seasons,
21 as he increased in his speed, you did, too, correct?

22 A. Not the whole time. We were mainly looking for just
23 eye distance the way he was going. So as long as we could
24 see, we were fine.

25 Q. But if he increased his speed, you increased yours

1 Q. When you got back on Brunner, that's when you
2 couldn't see the Blazer anymore, correct?

3 A. Yes.

4 Q. And you went looking for it where the road kind of
5 turns back into Ramsey?

6 A. Yeah, after the turn. It's Brunner and then the
7 turn, and then after the turn it goes back into Ramsey.

8 Q. After the Ramsey and Brunner intersection on Brunner
9 Road, it would probably be the south side of the road, there
10 is residences in that area as well, correct?

11 A. To the left of Ramsey?

12 Q. Yes.

13 A. There's one house, yes.

14 Q. Driveways?

15 A. Yeah, there is just a driveway that goes back, you
16 can see, they have a shop and the house right there.

17 Q. There's quite a few trees around that driveway,
18 correct?

19 A. You can see down and see their driveway.

20 Q. As you turn that corner, there's other residences
21 and side roads also, correct?

22 A. Yes.

23 Q. And Lone Mountain Road is fairly well populated,
24 also? Houses, people live on Lone Mountain Road?

25 A. I believe at this time they hadn't started to do --

1 to keep the eye, as you're saying, keep eye distance, correct?

2 A. On a lot of those roads we didn't have to increase
3 speed, if we did, because a lot of them are just straight, you
4 know, you can see a long ways.

5 Q. How fast do you think you got going on Weir Road?

6 A. I couldn't give you an exact. I'm not too sure.
7 I'm not sure.

8 Q. Didn't look at the speedometer on that road?

9 A. I remember my sister saying stuff but I don't
10 remember exactly looking over.

11 Q. How about on Seasons, do you know what your greatest
12 speed on Seasons Road was?

13 A. 60 or so.

14 Q. And not losing sight of that Blazer then, right?

15 A. Right.

16 Q. When he turned around on Seasons, you guys did, too,
17 correct?

18 A. After he had turned around and passed us, yes.

19 Q. Same thing on Weir, he turned onto Weir and so did
20 you?

21 A. Yes.

22 Q. I think you testified there were people on Weir when
23 you traveled north on Weir before Seasons. Were they still
24 there when you traveled south on Weir?

25 A. Not that I remember seeing.

1 they just recently put a road and houses back in there.

2 Q. Okay. Trees in that area?

3 A. Yes.

4 Q. On both sides of the street?

5 A. Yes.

6 Q. You recall telling the dispatcher on 911 that you
7 had lost the Blazer, you didn't know where he went?

8 A. I said that we couldn't see him, didn't know where
9 he went, yes.

10 Q. You were the one that placed the call to your
11 parents after you were waiting at Brunner and Ramsey, right?

12 A. Yes.

13 Q. You testified today that you were surprised to see
14 them show up, What did you tell them when you called them?

15 A. Just gave them a brief description of what
16 happened. We were waiting for the officer to get there.

17 Q. Do you think your voice was excited while you were
18 talking to them?

19 A. No.

20 Q. What did you tell them, what words did you use to
21 tell them the brief description?

22 A. Just let them know what happened. We were heading
23 home, somebody came up behind us, passed us, stopped. Just
24 didn't take all, you know, how long to tell the story, gave
25 them the main points. Told them we're not going to be home

1 right away, letting them know so they're not sitting there
 2 waiting.
 3 Q. And you had no idea they would show up?
 4 A. I didn't say come down here or anything.
 5 Q. Did your dad tell you we'll come catch up with you?
 6 A. No.
 7 Q. So you had no idea they would show up?
 8 A. No, I mean, I can't say they were coming down to
 9 make sure everything was okay, but I didn't say come down
 10 here.
 11 Q. Your younger sister and your nephew didn't come with
 12 your parents; is that right?
 13 A. Right.
 14 Q. Did your parents immediately come and speak with you
 15 when they arrived?
 16 A. Yeah, I believe they pulled in beside us and, you
 17 know, everything okay? What's going on at this point?
 18 Q. How long do you think you talked to them before they
 19 left to go somewhere else?
 20 A. Two to five minutes.
 21 Q. Can you show me on the map there which side of the
 22 intersection you were parked on waiting?
 23 A. While we were waiting we were on this side. And
 24 then when the officer got there he had us pull around behind
 25 him on the opposite side.

1 Q. Which way was your car facing before the officer had
 2 you turn around?
 3 A. Facing down this way.
 4 Q. When your parents show up did they get out of their
 5 car and come talk to you?
 6 A. No.
 7 Q. How did you speak with them, did you guys go talk to
 8 them?
 9 A. No, we were pulled off on the side of the road and
 10 they came up beside us.
 11 Q. So was it driver side to driver side, passenger side
 12 of your parents' car to driver's side of the car you were in?
 13 Side?
 14 A. Yeah, passenger side of their car to driver's side
 15 of my sister's car.
 16 Q. Would that have meant then, if I understood, your
 17 dad was in the passenger seat?
 18 A. Yes.
 19 Q. So the conversation was more directly between your
 20 dad and you and your sister?
 21 A. It was all four of us, I mean.
 22 Q. Did you decide that they would go and look for this
 23 Blazer themselves, was that something you talked about?
 24 A. No.
 25 Q. Did you know that's what they were going to do?

1 A. No.
 2 Q. When they left after just a few minutes, what did
 3 you think they were doing?
 4 A. Just looking. They headed, you know, we said we
 5 lost sight, we told them we lost sight and they were driving
 6 down from where we told them.
 7 Q. So you thought they were just driving back that way
 8 just looking?
 9 A. Yeah, they were just looking.
 10 Q. Did they come back a second time and talk to you
 11 after the officer was there and then left?
 12 A. Like they came and before the officer showed up for
 13 the first time?
 14 Q. After the officer had been there and then left, did
 15 your parents come back and talk to you again?
 16 A. Yes.
 17 Q. Had you told your dad enough about this Blazer and
 18 this man punching the window to make him angry?
 19 A. He was upset that it happened to his girls, yeah.
 20 Q. He was kind of agitated?
 21 A. I couldn't tell you what he was telling. We just
 22 told him what had happened.
 23 Q. How could you tell he was upset?
 24 A. I can't say he was upset, I don't know what he was
 25 feeling.

1 Q. Didn't you just tell me he was upset?
 2 A. He might have been upset. I don't know what his
 3 feelings were.
 4 Q. Did he tell you that he was mad, angry, upset?
 5 A. No.
 6 Q. Did he act any way different than he normally acts?
 7 A. No.
 8 Q. So his behavior was completely consistent with how
 9 he always acts when he left your car?
 10 A. Yes.
 11 Q. So 30 to 40 minutes you sat at this corner, correct,
 12 before Deputy Klinkefus arrives?
 13 A. Yes.
 14 Q. And when he arrived did you all get out of the car?
 15 A. No, he came to us.
 16 Q. He walked over to your car?
 17 A. Yes.
 18 Q. Were you part of the conversation or was it mostly
 19 Jovon, your sister, and Deputy Klinkefus?
 20 A. I believe I was part of it.
 21 Q. Do you recall talking to Deputy Klinkefus about
 22 where you thought the Blazer might have gone?
 23 A. Yes.
 24 Q. Do you recall agreeing with Deputy Klinkefus that it
 25 could have gone around that corner at Brunner and gotten

1 further ahead?
 2 A. No.
 3 Q. You don't recall agreeing that that could have
 4 happened?
 5 A. No.
 6 Q. And so Deputy Klinkefus spent, you said, just a
 7 couple minutes with you?
 8 A. Yes.
 9 Q. He gave you forms to fill out?
 10 A. Yeah.
 11 Q. What kind of forms were they?
 12 A. Police report forms. It was one single form.
 13 Q. Was it one for both of you or one for each of you?
 14 A. We both had our own.
 15 Q. And the officer told you he would go look around,
 16 correct?
 17 A. Yes.
 18 Q. Told you he would be right back in two minutes?
 19 A. He didn't give us a time.
 20 Q. He didn't tell you he would be right back in two
 21 minutes?
 22 A. No.
 23 Q. And he told you to call 911 if you saw the Blazer
 24 again, correct?
 25 A. Yes.

1 Q. He didn't tell to you follow the Blazer if you saw
 2 it again, correct?
 3 A. No.
 4 Q. So your parents came back right as soon as the
 5 deputy was leaving; is that right?
 6 A. The deputy had left, and I can't say they pulled in
 7 right behind, yeah, they came. Within a minute, minute and a
 8 half.
 9 Q. I want to talk a little bit more about whether or
 10 not the officer was told that he could be around the corner of
 11 Ramsey or whether or not you agree.
 12 MS. TAYLOR: Judge, if I could approach the witness?
 13 THE COURT: That would be fine.
 14 Q. (By Ms. Taylor) Miss Larsen, what I have is a
 15 transcript of the contact with Deputy Klinkefus here.
 16 MR. VERHAREN: Objection, lack of foundation. I think
 17 she needs to establish that through the deputy.
 18 MS. TAYLOR: I can save it, Your Honor.
 19 THE COURT: I don't know if she needs to establish it
 20 through the deputy, but she certainly needs to lay some
 21 foundation. That will be sustained.
 22 MS. TAYLOR: Your Honor, I can wait and recall this
 23 witness after Deputy Klinkefus has testified for this, that's
 24 fine.
 25 We will just skip ahead to where your parents, they

1 have come back and dad kind of was irritated that the deputy
 2 didn't go door to door on Brunner Road, correct?
 3 A. He asked why the deputy had gone like towards the
 4 corner and not towards Weir.
 5 Q. And it irritated him that the deputy had done that,
 6 correct?
 7 A. I don't know. He just had asked why. I don't know
 8 if he was irritated or anything. I don't know what he was
 9 feeling.
 10 Q. Your dad went back to that area to look himself,
 11 correct?
 12 A. He drove back that way, yes.
 13 Q. How many minutes do you think passed before you saw
 14 the Blazer come out of the driveway?
 15 A. After the deputy had left?
 16 Q. After your parents left the second time?
 17 A. Just long enough for them to drive up almost to
 18 Weir.
 19 Q. They didn't have time to stop and get out of the car
 20 or anything like that?
 21 A. They drove up. They drove up and then we weren't
 22 watching them the whole time because we were working on our
 23 reports, so I don't know if he got out, got back in. We were
 24 filling out our reports.
 25 Q. How far did you get on your report, how much

1 information did you get put down?
 2 A. Not very much at all.
 3 Q. So the time before you saw the Blazer was just
 4 enough to get just a little bit of information down on that
 5 form?
 6 A. Yes.
 7 Q. And I believe on that form just has your name and
 8 address information, is that your recollection of how far you
 9 got on that form?
 10 A. Yes.
 11 Q. You saw the Blazer and then what did you see your
 12 parents do?
 13 A. The Blazer had pulled out in front of my parents,
 14 they were further back down the road. And then as the Blazer
 15 pulled out my parents were facing the opposite way the Blazer
 16 was heading and they turned around.
 17 Q. They pulled in behind where the Blazer was, followed
 18 the Blazer toward your location?
 19 A. Yes.
 20 Q. And your car was facing north on Ramsey at this
 21 time, right?
 22 A. Yes.
 23 Q. When the Blazer went by and continued on Ramsey,
 24 your parents, they were behind the Blazer at that time?
 25 A. Yeah, they were a ways behind.

1 Q. And they waited for you to get turned around and
 2 pull in behind the Blazer, correct, before they made that
 3 corner at Ramsey?
 4 A. No.
 5 Q. They didn't wait?
 6 A. No.
 7 Q. When you got going on Ramsey, the Blazer was well
 8 ahead, correct?
 9 A. Yeah, he was ahead of us.
 10 Q. You picked up speed so that you could figure out
 11 where he was going, correct?
 12 A. I don't know how to say this. We were stopped,
 13 started going.
 14 Q. And you got going faster so that you could see where
 15 the Blazer was, though, correct?
 16 A. Faster than what?
 17 Q. You increased your speed until you got where you had
 18 good eyesight of that Blazer?
 19 A. Yes.
 20 Q. Your parents did the same thing?
 21 A. They were just behind us, we weren't really watching
 22 how close or far they were.
 23 Q. There were some times, though, you checked to see
 24 where your parents were, correct?
 25 A. There was once, and that was after we were pretty

1 Q. Two times prior to saying the officer says not to
 2 follow, do you remember that?
 3 MR. VERHAREN: Objection, asked and answered.
 4 THE COURT: Sustained.
 5 Q. (By Ms. Taylor) You got on Scarcello and your
 6 testimony is that you were up to 90 miles an hour?
 7 A. Yes.
 8 Q. Let's go to, we will talk about what happened at
 9 Scarcello. There is a driveway on the north side of Scarcello
 10 just after the incline, correct?
 11 A. Yeah, I don't know if it's a road or a driveway,
 12 exactly what it is, there is something there, yes.
 13 Q. And then also one on the south side?
 14 A. Down a ways farther.
 15 Q. What happened out there happens at the south side
 16 driveway and then before the north side roadway or driveway,
 17 is that correct?
 18 A. Between the two, yes.
 19 Q. Okay. When you and your sister came up that
 20 incline, is that when you saw the Blazer in the snowbank or
 21 heading towards the snowbank?
 22 A. We were up -- it probably flattened out a little
 23 base before we realized what was going on.
 24 Q. When you realized what was going on, though, the
 25 Blazer was at the snowbank, correct?

1 much through the corners on Ramsey.
 2 Q. And they were in behind, correct?
 3 A. Yes.
 4 Q. Your testimony was that as the Blazer went around
 5 that corner of Ramsey and Brunner, Mr. Ellington flipped you
 6 off and mouthed the words fuck you; is that correct?
 7 A. Yes.
 8 Q. That's something you have never talked about before,
 9 correct?
 10 A. No, I believe I have.
 11 Q. Which interview and who did you tell?
 12 A. I don't know who I told. I know because that's what
 13 happened that I have told it.
 14 Q. Didn't tell 911 when you were on with them, correct?
 15 A. I don't know what, I don't recall exactly what was
 16 said on the tape if that was on there.
 17 Q. Did you testify to that in either of the two prior
 18 preliminary hearings?
 19 A. Yes.
 20 Q. Do you recall the dispatcher telling you to slow
 21 down and not break any laws while you were following?
 22 A. Yeah, after we turned onto Scarcello.
 23 Q. Do you recall the dispatch operator telling you
 24 three times to slow down?
 25 A. I don't know a number.

1 A. Yes.
 2 Q. And you saw the Blazer go in reverse to get in the
 3 eastbound lane, which would have been the lane of escape,
 4 correct?
 5 A. Yes.
 6 Q. How close do you think the Honda was to the Blazer
 7 at that time, if you can give me an estimate of this courtroom
 8 size?
 9 A. From where the Blazer hit the snowbank and where we
 10 had stopped, probably like kitty-corner length.
 11 Q. Just from one corner of the courtroom to the next?
 12 A. Yeah.
 13 Q. And you kept moving forwards after you saw what it
 14 was doing, correct?
 15 A. Yeah, we had slowed down.
 16 Q. Just kind of creeping forward?
 17 A. Yeah.
 18 Q. At some point your parents' car came around the side
 19 of the Honda, correct?
 20 A. Yes.
 21 Q. Was there a time when the Honda was in one lane and
 22 the Subaru was in the other stopped or there was movement
 23 going on by both cars?
 24 A. They were like passing us.
 25 Q. And you were creeping forward still?

1 A. (Nodded affirmatively).
 2 Q. After they passed you, how far apart did the Subaru
 3 get, the back of the Subaru from the front of the Honda?
 4 A. Probably from about here -- here almost to the
 5 corner of the desk right there.
 6 Q. Is that the table where Mr. Verharen is sitting?
 7 A. Yes.
 8 Q. You saw your parents Subaru angle in, was that at
 9 that driveway on the south side where the Subaru was angling
 10 in?
 11 A. Yes.
 12 Q. Was the Subaru actually going into that driveway?
 13 A. It would have, yes, if it wouldn't have hit-- if the
 14 Blazer wouldn't have, if they wouldn't have hit.
 15 Q. So they were just kind of at the very edge of the
 16 road and the driveway where that meets, do I understand that?
 17 Q. The Subaru, your parents car, that's angled in. Is
 18 it angled so that where the road edge and the driveway edge
 19 meet, is that as far toward that driveway as the Subaru got?
 20 A. If not just a little bit farther, yes.
 21 Q. Let me make sure I understand that. A little bit
 22 farther, father into the driveway?
 23 A. Like farther, like turning into the driveway.
 24 Q. And that's because the Blazer was attempting to use
 25 that driveway to get around the vehicles blocking Scarcello?

1 Q. Where their car was when the car and Blazer met?
 2 A. Around in here.
 3 Q. And that's the front end is at kind of the mouth of
 4 the driveway and where the road meets?
 5 A. Yeah.
 6 Q. And then if you can take one of the other two colors
 7 and mark where your car was. And then the last color, show me
 8 where the Blazer was.
 9 A. Blazer was headed this way.
 10 Q. Tell me where the front end of it was.
 11 THE COURT: Just for the record, can we distinguish the
 12 colors so there won't be any confusion, which car is which
 13 color?
 14 MS. TAYLOR: I just realized I did that, Judge. I have
 15 kind of a turquoise-green as the Honda, the red is the Subaru,
 16 and the purple is the Blazer.
 17 THE COURT: Thank you.
 18 MS. TAYLOR: Thank you, Judge.
 19 Q. (By Ms. Taylor) This is after it backed up, after
 20 the Blazer has backed up and is trying to head east on
 21 Scarcello?
 22 A. Yes.
 23 Q. Show me where the front of the Blazer was?
 24 A. He had pulled back like this and then came forward.
 25 Q. So you're reversing on Scarcello and then coming

1 MR. VERHAREN: Objection, calls for speculation.
 2 THE COURT: Why don't you repeat that question, please.
 3 Q. (By Ms. Taylor) The Subaru was angled into the
 4 driveway, maybe just barely over the driveway, correct?
 5 A. Yes.
 6 Q. And then did you see the Blazer somewhere in that
 7 driveway?
 8 A. In front of them?
 9 Q. Yes, trying to pass by the front of them?
 10 A. The Blazer was over, I mean, they could have easy
 11 very well bypassed each other.
 12 Q. I think I'm not understanding this. We probably
 13 have an exhibit in there. Let me show this to the
 14 prosecutor. I think I'm going to maybe have her help me draw
 15 this.
 16 I have what I have marked Defendant's Exhibit A.
 17 You have seen a photo like that before, correct?
 18 A. Yes.
 19 Q. What does that appear to be to you?
 20 A. Overview looking down on Scarcello.
 21 Q. Just to help me understand this, I have got a couple
 22 of colors of pens here. If I could have you draw the position
 23 near the edge of the driveway of your parents' car, draw that
 24 one in red for me.
 25 A. Where their car?

1 forward on Scarcello, right?
 2 A. Yeah.
 3 Q. And then just if you can draw on the picture and
 4 show me where the front of the Blazer was when the Blazer and
 5 the Subaru met?
 6 A. Around in here.
 7 Q. And you have a circle in purple that indicates where
 8 the Blazer's front part was when they met?
 9 A. Yes.
 10 MS. TAYLOR: Your Honor, I think I'd move for admission
 11 of Defendant's A.
 12 MR. VERHAREN: No objection.
 13 THE COURT: Defendant's A can be admitted.
 14 MS. TAYLOR: What I would like to do, since I now
 15 understand that better but the jury can't see that. If I can
 16 borrow the prosecutor's exhibit that looks like that and maybe
 17 we can use the pointer.
 18 THE COURT: Are you asking to publish this to the jury?
 19 MS. TAYLOR: Please, Your Honor.
 20 THE COURT: Mr. Flock, if you will hand Exhibit A to the
 21 jury so they can pass that around.
 22 BAILIFF MR. FLOCK: Yes, sir.
 23 MS. TAYLOR: And, Your Honor, I'll wait for the rest of
 24 my questions while they examine that.
 25 (Silence)

1 A JUROR: Can we ask a question about it? A
 2 clarification of what she said?
 3 THE COURT: Did you not hear part of the testimony?
 4 A JUROR: I was curious what the circle indicated again?
 5 THE COURT: I'm sorry?
 6 A JUROR: I was just wondering what the circle
 7 indicated.
 8 THE COURT: I think we need to clarify that.
 9 Q. (By Ms. Taylor) Miss Larsen, you drew a circle on
 10 that map, what did that indicate?
 11 A. That's where they hit, like the place where the
 12 front of the car and the Blazer hit.
 13 Q. That indicates the front end of the Blazer?
 14 A. Yes.
 15 THE COURT: Thank you.
 16 MS. TAYLOR: Your Honor, how late are we continuing
 17 today?
 18 THE COURT: I don't know if it's practical to finish
 19 Miss Larsen's testimony. If it is, it would be nice. If you
 20 don't feel it's practical, we will probably be breaking here
 21 somewhat shortly.
 22 MS. TAYLOR: Your Honor, I have quite a bit more to talk
 23 to Miss Larsen about, and that was why I brought it up. I
 24 thought this might be a natural breaking point for today.
 25 THE COURT: Like I said, I didn't know how far we were

1 morning, I have a number of hearings, we're starting pretty
 2 early in the morning. Those hearings I usually do in the
 3 afternoon. I will try my best to be done with them at 9 a.m.,
 4 so we'll try to get under way as quickly as we can.
 5 And again due to the investiture of Judge Haynes
 6 tomorrow afternoon, we won't be able to go as long as I
 7 hoped. It won't be a long day tomorrow, but we'll certainly
 8 get some work done. With that we'll see you folks tomorrow.
 9 With that we'll stand adjourned. Let's take a short
 10 break and then we'll come back and do our law day matters so
 11 we can clear things out here.

(Conclude proceedings on August 24, 2006)

1 going to go. I thought if we could get Miss Larsen today, I
 2 think that would be appreciated, but it doesn't look like
 3 that's going to occur. Did our jury get through the exhibit
 4 yet, has that been passed back?
 5 BAILIFF MR. FLOCK: Yes, Judge.
 6 THE COURT: Thank you. We'll go ahead, I guess we haven't
 7 finished yet, Miss Larsen, so why don't you go ahead and step
 8 down. We are going to start tomorrow morning at nine o'clock,
 9 so we will see you back here at 9 a.m., thank you very much.
 10 You can step down.
 11 We will be in recess until tomorrow morning at
 12 9 a.m.. With that, members of the jury, again I'm going to
 13 admonish you not to discuss the case among yourselves, nor
 14 with others, nor shall you form or express an opinion about
 15 the matter until it is finally submitted to you. Again I will
 16 remind you, given the degree of news coverage in this
 17 particular case, I would certainly admonish you not to read
 18 anything in the papers about the case, listen to anything in
 19 the news, discuss anything with anybody about it. It's very
 20 important that you limit your consideration of this case based
 21 solely on the evidence that's produced in the courtroom during
 22 this process.
 23 With that in mind we'll see everyone back here
 24 tomorrow at nine o'clock.
 25 Again I have hearings that are scheduled in the

1 AUGUST 25, 2006, 9:30 O'CLOCK A.M.
 2 (WITHOUT THE JURY PRESENT)
 3 THE COURT: Good morning. This is continuation of State
 4 versus Ellington. I'm told the jury is present, parties are
 5 here. Looks like Mr. Ellington is present.
 6 Anything we need to take up before we return to the
 7 testimony, Mr. Verharen?
 8 MR. VERHAREN: No, sir.
 9 THE COURT: Miss Taylor.
 10 MS. TAYLOR: No, Your Honor.
 11 (JURY IS PRESENT)
 12 THE COURT: Good morning, ladies and gentlemen of the
 13 jury, I think we're ready to get under way. My earlier
 14 matters didn't go too much over what I was hoping, but we got
 15 those out of the way and we're ready to get under way.
 16 Good morning, Miss Larsen. We have a new day here,
 17 so I'm going to administer a new oath for you. So if you will
 18 raise your right hand, the clerk will administer that, please.
 19 JOLEEN LARSEN
 20 was continued as a witness on behalf of the
 21 State, having been first duly sworn, was
 22 examined and further testified as follows:
 23 THE COURT: Thank you very much. And with that I believe
 24 we are still engaged in cross-examination, Miss Taylor. So as
 25 soon as you're comfortable, you can go ahead and inquire.

1 Q. Let me see if I can clarify. Would that have been
 2 towards the driver's side of the car of the Subaru?
 3 A. Yes.
 4 Q. Did it appear that he was attempting to get on
 5 Scarcello Road after that collision?
 6 A. After the collision?
 7 Q. Yes.
 8 A. He came straight to me and my sister, which we were
 9 in our own lane.
 10 Q. Your Honda was in the westbound lane?
 11 A. Yes.
 12 Q. Straight in the westbound lane?
 13 A. Straight in the lane, we weren't turned or anything,
 14 just in the lane, like just placed center in the lane.
 15 Q. You weren't coming across the center line, kind of a
 16 line the same way the Subaru was, coming around the center
 17 line of that road?
 18 A. No.
 19 Q. All right. And I think yesterday you indicated that
 20 between the Honda and the Subaru there was about as much as
 21 space between you and Mr. Verharen, correct?
 22 A. Yes.
 23 Q. And that big SUV was able to maneuver around that to
 24 strike the Honda?
 25 A. Yes.

1 MS. TAYLOR: Your Honor, thank you.
 2 CROSS-EXAMINATION (cont'd)
 3 BY MS. TAYLOR:
 4 Q. Good morning, Miss Larsen.
 5 A. Good morning.
 6 Q. Yesterday when we left off we were talking about the
 7 placement of the Blazer and the Subaru at the time of that
 8 collision, is that where you recall us leaving off?
 9 A. Yes.
 10 Q. That was in that driveway on the south side of
 11 Scarcello Road, correct?
 12 A. Yes.
 13 Q. At the time that collision occurred, the Subaru was
 14 still moving forward a bit, correct?
 15 A. Slowly.
 16 Q. Did you see the Blazer going into that driveway as
 17 the collision occurred?
 18 A. Like headed into the driveway?
 19 Q. Yes.
 20 A. No.
 21 Q. Did you see the Blazer coming out of the driveway at
 22 the collision?
 23 A. Yes.
 24 Q. Which way did you see the Blazer go?
 25 A. He was headed to the right which would be east.

1 Q. And that was a head-on collision?
 2 A. Yes.
 3 Q. Did the Honda begin to move? I think you said you
 4 couldn't tell which direction, but did the Honda begin to move
 5 immediately at that time?
 6 A. Yes.
 7 Q. And is that when the screaming started?
 8 A. Yes.
 9 Q. On the 911 call?
 10 A. I think it started as we seen him coming to us.
 11 Q. Okay. Now, right before that screaming started I
 12 could hear you yell stop, were you telling your sister to stop
 13 moving?
 14 A. I don't know.
 15 Q. Did you know your sister's car was still in drive at
 16 the time of the collision?
 17 A. I don't know. We were slowly moving, I believe,
 18 still, so, yeah.
 19 Q. At the time of the collision you were?
 20 A. Yes.
 21 Q. Okay. Yesterday I believe you said that the travel
 22 across the Scarcello Road when the two vehicles were engaged
 23 was a just a matter of seconds; is that right?
 24 A. Will you say that again?
 25 Q. The travel across, when the Blazer and the Honda

1 were engaged together, the travel across Scarcello to the side
 2 of the road, just a matter of seconds?
 3 A. Yeah.
 4 Q. Did you see the Blazer reverse to get away from the
 5 front of the Honda?
 6 A. No, the next thing I seen after he hit us in the
 7 front was the grille in the driver's side window.
 8 Q. Were you getting out at that point?
 9 A. After I seen it hit the driver's side, he had
 10 already hit us on the driver's side and that's when I got out.
 11 Q. The car was still moving at that point?
 12 A. When I stepped out we were just barely moving.
 13 Q. Was it still moving when you yelled for Jovon to get
 14 out?
 15 A. No, I believe we were stopped but he was still, he
 16 was still -- it might have been the last time that he actually
 17 hit, he was still there, that's why I yelled at her to get
 18 out.
 19 Q. And she did that?
 20 A. Yes.
 21 Q. When you got out, you were facing the Honda,
 22 correct?
 23 A. I was facing up to the road.
 24 Q. With still facing where Jovon was going to get out?
 25 A. I was standing right next to the door facing the

1 it at the window area?
 2 A. Yeah, the Honda was like this, and he was at the
 3 driver's side window.
 4 Q. Kind of scraping down the side?
 5 A. Yes.
 6 Q. After you got out of your car I think you indicated
 7 you heard gunshots?
 8 A. After my mom was hit, yes.
 9 Q. And that was just one gunshot, correct?
 10 A. All I remember hearing is I remember hearing one.
 11 Q. Where was your dad when you very first saw him?
 12 A. When I first saw him we were all running to my mom.
 13 Q. Was he running kind of close to you, alongside of
 14 you?
 15 A. I went straight up and he was coming down the road.
 16 Q. Did you ever see the gun in his hand?
 17 A. Yes.
 18 Q. When was the first time you saw that?
 19 A. Just as we all running, got to my mom.
 20 Q. At that time your dad had an injury to his left arm?
 21 A. Yes.
 22 Q. Was his arm in a sling on that day?
 23 A. Yes.
 24 Q. Right after this happened did any other people drive
 25 up?

1 road.
 2 Q. Did you have to turn your body position to see what
 3 happened to your mom?
 4 A. No.
 5 Q. Just standing there you were able to see?
 6 A. (Nodded affirmatively).
 7 Q. On that 911 tape we hear the screams begin right
 8 after -- I think you state something about being hit, that he
 9 had hit you, is that when you saw your mom running towards you
 10 and get struck?
 11 A. I seen my mom after I was outside, I had already got
 12 out of the car.
 13 Q. Okay. I think on the 911 tape there is a statement
 14 from you that says he just hit us, or something to that
 15 effect, in response to 911 dispatcher asking you what was
 16 going on?
 17 A. Uh-huh. (Affirmative).
 18 Q. And then right after that the scream starts again.
 19 Is that when you saw that happen, when the scream starts
 20 again?
 21 A. We were screaming throughout the whole thing. There
 22 might have been a break and then, yeah, when I seen her get
 23 hit definitely screaming.
 24 Q. Okay. Let me make sure I understand where the
 25 Blazer was when you got out. Was it front of the Blazer, was

1 A. There was people headed east on Scarcello and there
 2 was three or four cars that were sitting there that seen it.
 3 Q. That they would have been in the eastbound lane?
 4 A. Yes.
 5 Q. Did anybody stop and talk to you?
 6 A. Yeah.
 7 Q. Where did they stop their car to talk to you?
 8 A. There was people that were stopped right before
 9 where the Subaru was hit. They were back, right before the
 10 road started.
 11 Q. Anybody on the other side of it closer to where the
 12 Honda was?
 13 A. The only person that pulled up on that side was an
 14 officer.
 15 Q. Do you remember having a conversation with a lady
 16 that maybe got out of her car to talk to you right after this
 17 happened?
 18 A. There was a couple different people that were around
 19 kind of asking what was going on.
 20 Q. Was that just right after this happened there were
 21 people there to talk to you?
 22 A. Yeah. We had ran to my mom, we were there a minute,
 23 two minutes, and then we came, the officer had made us go back
 24 and then there was people there.
 25 Q. Before the officer got there do you remember

1 speaking to a lady that I believe she had a child with her in
2 the car?

3 A. I remember there was a lady there and she was in her
4 van and she was just there and she asked what had just
5 happened, and then she left.

6 Q. Was that the first person that you talked to?

7 A. Yes.

8 Q. And that was before Deputy Klinkefus got there; is
9 that right?

10 A. I believe he was there and pushed us back, made us
11 get back, and then she was right where we moved back to.

12 Q. Okay. On the 911 tape we could hear kind of in the
13 background the statement, daddy, daddy, he just went into the
14 snowbank, was that you or was that Jovon that said that?

15 A. Jovon.

16 Q. Was your dad in your car with you?

17 A. No.

18 Q. And that's when the Blazer was in the snowbank
19 before he reversed to try to go eastbound on Scarcello or back
20 the way you guys had come; is that right?

21 A. Yes.

22 MS. TAYLOR: Your Honor, if I can approach?

23 THE COURT: That would be fine.

24 Q. (By Ms. Taylor) Miss Larsen, I'm handing you
25 Defendant's exhibit B, do you recognize that?

1 and E. Do you recognize those?

2 A. Yes.

3 Q. Are they both yours?

4 A. This one doesn't look familiar.

5 Q. That one does not have your name on it?

6 A. Yeah, it doesn't look familiar.

7 THE COURT: And that is which one?

8 MS. TAYLOR: Exhibit E.

9 Q. (By Ms. Taylor) We can just hold of that one and
10 we will talk about D for a minute. Is that something that you
11 helped create in an interview?

12 A. Yes.

13 Q. Can you tell me what's on that?

14 A. Just drawing of what happened.

15 Q. When did you make that?

16 A. I believe this was right after the accident
17 happened.

18 Q. Would that have been with your interview with
19 Detective Maskell on January 4th?

20 A. Is it the 4th or the 1st? We had one right after
21 everything happened.

22 Q. Did you make drawings in that one, too?

23 A. I don't for sure remember.

24 Q. That one appears to be dated January 4th, does that
25 help refresh your memory when you made that?

1 A. Yes.

2 Q. What is that?

3 A. It's the form the officer gave us to fill out.

4 Q. Is that your handwriting on there?

5 A. Yes.

6 Q. And that's all the information you were able to get
7 on that form?

8 A. Yes.

9 MS. TAYLOR: Your Honor, we'd move for admission of
10 Defendant's B.

11 MR. VERHAREN: I don't have any objection, although I do
12 have the original there with the clerk, and I was intending to
13 admit the original. We can have two of them if you like.

14 MS. TAYLOR: We can admit it and then we can take it back
15 once his original is admitted.

16 THE COURT: The rule certainly doesn't require the
17 original to be admitted as long as this is an accurate
18 reproduction of the original, so exhibit B can be admitted.

19 With that, hand that over to my clerk, if you would,
20 Miss Larsen, and she will mark it. And if you need to look at
21 it further, she will hand it back to you.

22 MS. TAYLOR: Your Honor, I have a couple of more, if I
23 can approach the witness again?

24 THE COURT: That would be fine, thank you.

25 Q. (By Ms. Taylor) I'm handing you Defendant's D

1 A. Yeah.

2 MS. TAYLOR: Judge, we'd move for admission of
3 Defendant's D.

4 MR. VERHAREN: No objection.

5 THE COURT: Exhibit D can be admitted. Miss Larsen, if
6 you will hand it to my clerk so she can mark it admitted.

7 MS. TAYLOR: And then if she can be handed the exhibit
8 back.

9 THE COURT: Certainly.

10 Q. (By Ms. Taylor) Miss Larsen, looking at that it
11 appears there is something in the westbound lane, what is
12 that? There is some drawing.

13 A. This?

14 Q. Maybe I should just have you explain to me what we
15 have. Maybe you can write, there's a couple of specific
16 marks. It looks like there's tracks in that. Can you tell me
17 what those relate to going in that driveway on the southbound
18 area?

19 THE COURT: Excuse me, before she writes on the exhibit,
20 and I don't know what color ink is on the exhibit, I just want
21 to make sure that the admitted exhibit and anything that she
22 may add to that can be distinguishable. I don't know if the
23 ink is a different color.

24 MS. TAYLOR: It is, Your Honor, I have handed her a blue
25 pen and it's a photocopy in black.

1 THE COURT: Thank you, I can't tell from this distance,
2 thank you. Go ahead.
3 Q. (By Ms. Taylor) If you can just label for me what's
4 in this area here, what that relates to?
5 A. (complied).
6 Q. Does that drawing indicate where you're saying the
7 Honda was when it was hit?
8 A. Yes.
9 Q. Can you label that area on the map or on the drawing
10 as well?
11 A. (complied)
12 Q. Maybe you could make an x where you have indicated
13 on that drawing where the Honda was when it was hit?
14 A. (complied)
15 MS. TAYLOR: Judge, with that I'd ask to publish it to
16 the jury.
17 THE COURT: Any objection?
18 MR. VERHAREN: Maybe with a little more clarification, if
19 the witness could write in there Honda with the X so it's
20 clear. With that I'd have no objection.
21 THE COURT: I think that's a fair request. If you want
22 to go ahead and publish that, why don't you hand that to the
23 bailiff and he will circulate that.
24 (Jurors viewing Defendant's exhibit D)
25 THE COURT: Continue.

1 A. Yes.
2 Q. And do you recognize the numbers called as numbers
3 that you have called that you know?
4 A. Some of them, yeah.
5 Q. And that's the phone that you had on the end of
6 December, 2005, and early January, 2006?
7 A. Yes.
8 MS. TAYLOR: Your Honor, we'd move for addition of
9 Defendant's C.
10 THE COURT: Do you have some questions now,
11 Mr. Verharen?
12 MR. VERHAREN: Thank you, Judge.
13 VOIR DIRE EXAMINATION
14 BY MR. VERHAREN:
15 Q. Joleen, have you ever seen that document before?
16 A. No.
17 Q. Do you know how counsel got that document?
18 A. No.
19 Q. Do you know if that document is accurate?
20 A. No.
21 MR. VERHAREN: Judge, I'm going to object, I don't think
22 counsel has laid the foundation for that.
23 THE COURT: Any other questions?
24 MS. TAYLOR: Not of this witness, Your Honor, we will
25 just go ahead and leave that there.

1 MS. TAYLOR: Thank you. One more time, if I may
2 approach?
3 THE COURT: That would be fine.
4 Q. (By Ms. Larsen) Miss Larsen, now I'm handing you
5 what's been marked Defendant's Exhibit C. I'll give you a
6 minute to review that.
7 Does that appear to be a statement of your phone
8 records for your cell phone?
9 MR. VERHAREN: I'm going to object to the lack of
10 foundation. Ask to ask a couple questions in aid.
11 THE COURT: I don't think we need any questions in aid.
12 Sustain at this time. Perhaps you can lay the foundation.
13 Q. (By Ms. Taylor) Do you recognize what that document
14 is?
15 A. Yes.
16 Q. What is it?
17 A. Looks like numbers that I have called from my phone,
18 cell phone.
19 Q. Is that a copy of something you might receive as a
20 monthly statement or an occasional statement?
21 A. I get a statement, but it's not set up like this.
22 Q. Usually there's more pages to it, correct?
23 A. Well, how it's set up, it doesn't tell me some of
24 this stuff on my statement that I get.
25 Q. You recognize your phone number on there?

1 THE COURT: I would agree that the partial foundation has
2 been laid, but not sufficient enough for admission, so
3 sustained.
4 CROSS-EXAMINATION (cont'd)
5 BY MS. TAYLOR:
6 Q. I want to talk about a couple things that we talked
7 ABOUT a little bit about yesterday. I think yesterday you
8 testified that during the entire time that you and your sister
9 and the Honda were following Mr. Ellington you were keeping
10 eye with him, did I understand your testimony then?
11 A. Yes.
12 Q. Do you recall testifying in a preliminary hearing
13 the first time in January of this year?
14 A. Yes.
15 Q. Do you recall talking about keeping pace with
16 Mr. Ellington at that hearing?
17 A. I don't know what word I used, just we were keeping
18 distance between us.
19 Q. Let me see if I can understand those two things
20 together. Keeping some distance but staying so that you could
21 always see him, staying if he sped up, you sped up so you
22 could always see him?
23 A. As long as we had like eye contact with the vehicle,
24 yeah.
25 Q. And I wanted to talk a little bit more about when

1 Mr. Ellington came around Ramsey Road after the 40 minute wait
2 for Deputy Klinkefus. Yesterday you indicated he mouthed the
3 words fuck you to you?

4 A. Yes.

5 Q. I'm going to ask if you can review some prior
6 testimony and then I have a question for you.

7 MS. TAYLOR: Your Honor, if I can approach, let me get
8 both of these.

9 THE COURT: That would be fine.

10 MR. VERHAREN: It might be easier if the court handed the
11 copy of the preliminary hearing transcript to the witness.

12 THE COURT: I can do that if we have it.

13 MS. TAYLOR: Your Honor, beginning with the first
14 preliminary hearing in the 06-33.

15 THE COURT: I'm not sure I have that one.

16 MS. TAYLOR: I have it.

17 THE COURT: I don't think I have that one.

18 MR. VERHAREN: Then I guess counsel will have to give it
19 to her.

20 THE COURT: I do have the other one. Let me
21 double-check. No.

22 MS. TAYLOR: Mr. Verharen, I'm on page 174 of the first
23 one, and 208 of the second one.

24 Q. (By Ms. Taylor) This is page 174, if I can get you
25 to review the highlighted area for me. When you're done with

1 any words to you, correct?

2 A. And then asked can you see his face, and we said
3 yes.

4 Q. And then we will move on. What kind of expression
5 did he have on his face? And your answer?

6 A. Mad and angry.

7 Q. And still no mention of mouthing words, correct?

8 A. Yes, but it doesn't ask.

9 Q. But this hearing was the first time that you
10 volunteered that new detail, correct?

11 A. I believe it's been said because that's what
12 happened.

13 Q. You had an interview, let's see, with deputy
14 Klinkefus first, correct? The officer that arrived at Ramsey
15 and Brunner and then was the first officer on the scene at the
16 accident at Scarcello?

17 A. An actual like sit-down interview with him?

18 Q. No, just a conversation with him?

19 A. I don't remember specifically if I did or not.

20 Q. Were you a part of a conversation with him with your
21 sister?

22 A. Before the accident happened, yes.

23 Q. And then after when he arrived there you don't
24 recall speaking to him?

25 A. No.

1 that, if I can get you to review on page 208 of the second
2 transcript, just the highlighted area.

3 After reviewing both of those documents would you
4 agree that both of the times you have testified under oath in
5 prior hearings that was left out, that statement that he
6 mouthed fuck you was never brought forth in either of those
7 hearings?

8 A. It asked if he made any gestures and we said yes.

9 Q. I think it was specific that he flipped you off, is
10 that your recollection of what you just reviewed or would you
11 like me to bring it back?

12 A. And asked if we could see his face and we said yes.
13 It doesn't ask if anything was said.

14 Q. Let's look on page 208 of the second transcript.

15 MS. TAYLOR: May I approach again, Your Honor?

16 THE COURT: That's fine.

17 Q. (By Ms. Taylor) I'm reading, I'll read the first
18 question. How close did he come to you when he turned onto
19 Ramsey? Will you read your answer, please?

20 A. Maybe five feet or so, really close.

21 Q. The next question. Do you remember him doing
22 anything as he drove by you there on Ramsey? And your
23 answer?

24 A. He was flipping us off when he went by.

25 Q. And at that time you didn't indicate that he mouthed

1 Q. Later that day I believe you testified you were
2 taken to the Rathdrum Police department, correct?

3 A. Yes.

4 Q. You mentioned you interviewed with several people,
5 do you remember how many?

6 A. There was different people asking us, some of them
7 weren't as long. But there was one that we sat down and went
8 through the whole thing.

9 Q. Would that have been Detective Stewart?

10 A. Yes.

11 Q. After that day did you interview with anybody else,
12 let's just stay with the 1st, on January 1st did you interview
13 with any officers at the Rathdrum Police department?

14 A. We didn't go through the whole thing. Like there
15 was a couple questions asked but nothing long.

16 Q. Nothing where you would have given your whole
17 statement, correct?

18 A. Yes.

19 Q. And then with Detective Maskell on January 4th, was
20 that the next person that you gave a sit-down interview with?

21 A. Yes.

22 Q. And did you give him a full and complete statement?

23 A. Yes.

24 Q. Did you give Detective Stewart on January 1st a full
25 and complete statement?

1 A. Yes.
 2 Q. Who else did you interview with between January 4th
 3 when you talked to Detective Maskell and then the preliminary
 4 hearing the first time?
 5 A. I talked to Art.
 6 Q. Interviewed with Mr. Verharen?
 7 A. Yes.
 8 Q. And that was in preparation for your testimony at
 9 the first preliminary hearing, correct?
 10 A. Yes.
 11 Q. Between the first and the second preliminary
 12 hearing, that few week time span, who did you interview you?
 13 A. Just talking to Art again.
 14 Q. And prior to trial after the second preliminary
 15 hearing between February and now, who have you spoken with?
 16 A. Art.
 17 Q. Anybody else?
 18 A. No.
 19 Q. No other attorneys?
 20 A. I have talked to an attorney, yes, but nothing we
 21 haven't sat down and gone through the whole time.
 22 Q. Does that relate to your claim against this county
 23 in an amount of one million dollars?
 24 A. I don't know what it -- I talked to the attorney and
 25 we just talked about what had happened, and the reason being

1 THE COURT: That would be fine.
 2 MS. TAYLOR: Ms. Larsen, thank you, I don't have any
 3 other questions at this time.
 4 THE COURT: Redirect, Mr. Verharen.
 5 REDIRECT EXAMINATION
 6 BY MR. VERHAREN:
 7 Q. When did your sister have back surgery?
 8 MS. TAYLOR: Your Honor, I'm going to object. I don't
 9 think foundation has been laid to go into that. And may be a
 10 different witness to ask that question.
 11 THE COURT: I don't know if she said has had it yet, but
 12 I think you can make some limited inquiry since it was brought
 13 out on cross-examination. Continue.
 14 Q. (By Mr. Verharen) Joleen, do you know when your
 15 sister had back surgery?
 16 A. Yes.
 17 Q. When was that?
 18 A. It was about six weeks ago.
 19 Q. Do you know why she had back surgery?
 20 MS. TAYLOR: Your Honor, I'm going to object to that. I
 21 think that there's other witnesses that he can ask about
 22 that. It would rely on hearsay or speculation on her part.
 23 She doesn't have the foundation to testify about that.
 24 THE COURT: I think she can answer yes or no, and then we
 25 can certainly find out. You can answer yes or no if you know

1 is we have been having problems with insurance paying for my
 2 sister's back surgery.
 3 Q. And you didn't talk to an attorney about the tort
 4 claim against this county, specifically Deputy Klinkefus,
 5 asking for a million dollars for each you, your sister, your
 6 father, both your sisters, actually, and your father?
 7 A. He didn't say anything about what it would be. He
 8 just let us know, you know, because we have been having
 9 problems with insurance and stuff so there had to have been
 10 something started there so they would pay for the back surgery
 11 that my sister had because of this.
 12 Q. And that related to the claim against the county,
 13 though, correct?
 14 A. I don't know what was put in after that.
 15 Q. But the conversation with the attorney was about
 16 suing the county?
 17 A. No, he let me know that there was something to be
 18 done with insurance to pay for the back surgery of the
 19 accident.
 20 Q. Are you a party to a suit against Kootenai County,
 21 specifically Deputy Klinkefus?
 22 A. I signed papers, yes.
 23 Q. So you are a party to that lawsuit?
 24 A. Yes.
 25 MS. TAYLOR: And, Judge, if I can have a just a minute?

1 why she did?
 2 A. Yes.
 3 Q. (By Mr. Verharen) Can you tell us why?
 4 MS. TAYLOR: Your Honor, now I'll raise my objection.
 5 THE COURT: I don't know if your question calls for a
 6 medical response, which I would certainly sustain, or if
 7 simply calls for something within her ability to opine about.
 8 I trust we are not going to get a medical opinion from this
 9 witness. So if you can answer the question without giving us
 10 a medical opinion, you can go right ahead.
 11 A. Back was hurt during the wreck.
 12 Q. Counsel was asking you some questions about
 13 preliminary hearings, Joleen, and you were able to read your
 14 full answer in the second preliminary hearing on page 208.
 15 What I would like you to do is read your whole answer from the
 16 first preliminary hearing on 174, you didn't get an
 17 opportunity to do that. So let me approach.
 18 Direct your attention here to page 174, the first
 19 preliminary hearing. I was asking you some questions at that
 20 time, right?
 21 A. Yes.
 22 Q. And here on line 1 I asked you: So he went back
 23 Ramsey, took a left on Brunner?
 24 What was your answer on line 3?
 25 A. Went down Brunner, took a left on Ramsey.

1 Q. Then I asked you: You're right, okay, how close did
2 he come to you at that point, what did you see?
3 A. Within five feet.
4 Q. And then I asked you: Could you see him?
5 A. Yes, I could.
6 Q. And then asked I asked you was it the same person
7 that had got out before?
8 A. Yes, it was.
9 Q. And I asked you the same vehicle?
10 A. Yes.
11 Q. And then did I ask you: Did he make any gestures to
12 you at that time?
13 A. Yes, flipped us off.
14 Q. And then I asked you: Could you see his face at that
15 time?
16 A. Yeah, he was looking at us.
17 Q. And then I asked you: Any expression that noted you
18 night?
19 A. Yeah, kind of mean, glary look.
20 Q. You've had to talk about this incident many times
21 now at this point; is that right?
22 A. Yes.
23 Q. As counsel has mentioned, with Detective Stewart,
24 Sergeant Maskell, you have had to testify a couple of times
25 before; is that right?

1 and your dad was in the passenger seat?
2 A. Yes.
3 Q. So when they passed you there as Mr. Ellington
4 skidded to a stop at that snowbank, would your father have
5 been closest to your sister Jovon?
6 A. Yes.
7 Q. In terms of the collision that occurred between the
8 Blazer and the Honda, I think there was a little bit of talk
9 about a clear path away for the Blazer after the Blazer and
10 the Honda had that contact, do you remember that?
11 A. Yes.
12 Q. What do you mean by the fact that the Blazer at that
13 point after the contact with the Blazer and the Honda, what do
14 you mean that it had a clear path away?
15 A. By the time by mom was hit she was in our lane. The
16 leaving lane was empty.
17 Q. You're talking about when your mom got run over?
18 A. Yes.
19 Q. I want to back up a little bit, I want to get to the
20 time where the Blazer was coming around your mom and dad's car
21 and they hit?
22 A. The Subaru and the Blazer then?
23 Q. Yes, I'm sorry, that's my fault. At that time was
24 there a clear path at that time for the Blazer to leave after
25 that contact?

1 A. Yes.
2 Q. And all these other occasions, these happened before
3 this lawsuit; is that right?
4 A. Yes.
5 Q. Has your testimony today about this event changed
6 from any of these prior occasions that you have told other
7 folks what happened?
8 A. No.
9 Q. You were asked about the point in that 911 tape
10 where you can hear the phrase daddy, daddy, he hit a snowbank,
11 something like that, do you remember that?
12 A. Yes.
13 Q. At the time that your sister said that, where were
14 with your mom and dad, do you remember?
15 A. No.
16 Q. How long after that was it that they came around in
17 front of you?
18 A. Matter of seconds.
19 Q. Is it possible then that your mother and father were
20 passing by you as your sister said that?
21 A. Yes.
22 Q. Your sister was in the driver's seat facing
23 westbound; is that right?
24 A. Yes.
25 Q. And I think you told us that your mom was driving

1 A. Yes.
2 Q. Can you tell us about that, please?
3 A. After the contact the road was open to leave, we
4 were in our own lane so we were not blocking him.
5 Q. In terms of when the Blazer came across the road and
6 struck you and your sister, I think you talked about then it
7 started to push the car that you were in?
8 A. Yes.
9 Q. During the time it started pushing and until the
10 time it stopped pushing, could you hear the sound of the
11 engine of the Blazer?
12 A. Yes.
13 MS. TAYLOR: Your Honor, I'm going to object, I think
14 that was asked and answered yesterday.
15 THE COURT: Sustained.
16 Q. (By Mr. Verharen) Was there ever a time when that
17 Blazer was pushing you and your sister off the road that you
18 heard the engine not accelerating?
19 A. No.
20 MR. VERHAREN: Can the witness please be handed exhibit
21 155, please? This is going to be that original witness
22 statement. I'm sorry, I wrote it down wrong. 150.
23 Q. (By Mr. Verharen) Joleen, is that the original
24 witness statement that you attempted to fill out that
25 particular day?

1 A. Yes.
 2 MR. VERHAREN: Move to admit 150.
 3 MS. TAYLOR: No objection.
 4 THE COURT: 150 can be admitted.
 5 MR. VERHAREN: Can the witness be shown Plaintiff's
 6 Exhibit 68, please, it's a photograph?
 7 MS. TAYLOR: Your Honor, if I may approach also?
 8 THE COURT: That would be fine.
 9 Q. (By Mr. Verharen) Joleen, do you recognize that
 10 vehicle?
 11 A. Yes.
 12 Q. Can you hold it up for the jury, please. How do you
 13 recognize that vehicle?
 14 A. This was the vehicle that took place in all of the
 15 wreck.
 16 Q. Is that the vehicle that Mr. Ellington used to ram
 17 your sister's car?
 18 A. Yes.
 19 Q. Is that the vehicle he used to kill your mother?
 20 A. Yes.
 21 MR. VERHAREN: I don't have any other questions. I would
 22 move at this time to publish Plaintiff's Exhibit number 1.
 23 THE COURT: Plaintiff's exhibit 1?
 24 MS. TAYLOR: Your Honor, I need to see which one
 25 number 1 is.

1 MR. VERHAREN: It's a photograph of the family.
 2 MS. TAYLOR: Your Honor, I don't think it needs to be
 3 published. I think it can certainly go back to the jury room,
 4 but I don't think it needs to be published at this point.
 5 THE COURT: It's an admitted exhibit, so it can be
 6 published.
 7 (Jurors view Plaintiff's exhibit 1)
 8 MR. VERHAREN: I didn't have any other questions, Judge.
 9 THE COURT: Recross.
 10 MS. TAYLOR: Just briefly. And if I may approach, Your
 11 Honor, I need to retrieve one of the state's exhibits?
 12 THE COURT: That's fine.
 13 MS. TAYLOR: Your Honor, I have Plaintiff's exhibit 23.
 14 RECROSS EXAMINATION
 15 BY MS. TAYLOR:
 16 Q. Miss Larsen, I'll hand you State's admitted
 17 exhibit 23, on that exhibit do you see debris from the Honda
 18 in the road?
 19 A. Yes.
 20 Q. And you see that it crosses over into the eastbound
 21 lane?
 22 A. Yes.
 23 MS. TAYLOR: Thank you. And that's all I have, Miss
 24 Larsen, thank you.
 25 MR. VERHAREN: May this witness be excused?

1 THE COURT: Any objection?
 2 MS. TAYLOR: Your Honor, she has been issued a subpoena
 3 by us as well and we would like to put her on call. If she
 4 prefers, we can go through the prosecutor's office to let her
 5 know when we might need her again.
 6 THE COURT: You can step down. You certainly can be
 7 excused at this point in time. You still may be needed as a
 8 witness. And so Miss Taylor if wishes to call you back as a
 9 witness, she will let Mr. Verharen's know, so make sure that
 10 they can get in touch with you until we're done. Thank you
 11 very much.
 12 With that you can call your next witness.
 13 MR. VERHAREN: Thank you, Judge. Eric Hartmann.
 14 MR. SCHWARTZ: Judge, we would like to ask for a hearing
 15 outside the presence of the jury before this witness
 16 testifies.
 17 THE COURT: Members of the jury, I guess we have a matter
 18 we'll take up outside your presence. Before we do that, I
 19 would admonish you not to discuss the case among yourselves,
 20 nor with others, nor shall you form or express an opinion
 21 about it until it is finally submitted to you. With that you
 22 folks can go ahead and take a few minutes. And while you're
 23 doing that we will take up our business.
 24 (The jury left the courtroom)
 25 (WITHOUT THE JURY PRESENT)

1 THE COURT: We have removed the jury from the courtroom.
 2 Mr. Schwartz, are you handing this matter, I assume?
 3 MR. SCHWARTZ: Yes, Your Honor, thank you. We are going
 4 to be requesting a Dollard hearing regarding this expert
 5 testimony. We don't believe that it's scientifically reliable
 6 and we'd like to establish that before testimony is presented
 7 to the jury.
 8 THE COURT: Mr. Verharen.
 9 MR. VERHAREN: Judge, this is simply testimony that a
 10 recording had some background noise taken out of it, that's
 11 the essence of it. I don't know that that type of hearing is
 12 requested for this sort of testimony.
 13 MR. SCHWARTZ: Your Honor, that's not the extent of the
 14 testimony. The expert is prepared to testify that there are
 15 percussive sounds that he's going to say are consistent with
 16 gunshots. He conducted several different enhancements of the
 17 audiotape in order to achieve that conclusion that there are
 18 sounds consistent with gunshots in the background noise. We
 19 would like to discuss how he reached those conclusions and
 20 what methodology was used and whether they're scientifically
 21 reliable.
 22 THE COURT: Unless there's been some changes recently
 23 that I've missed, and I know Daubert was certainly helpful in
 24 terms of evaluating scientific evidence, I'm not sure Idaho
 25 has adopted the Daubert requirement.

1 MR. SCHWARTZ: Your Honor, I believe the case is State v
2 Perry, which is 139 Idaho 520. That's a case regarding
3 polygraph examinations.

4 THE COURT: Polygraph evidence would be a little easier
5 to rule on. Either way there is going to be some foundational
6 requirements. We can dispatch that in a hearing outside the
7 presence of the jury in efficient fashion, perhaps we can deal
8 with it. Is your witness here?

9 MR. VERHAREN: He is.

10 THE COURT: And again what is offer of proof that you're
11 going to be submitting, Mr. Verharen?

12 MR. VERHAREN: In terms of -- I can go through his
13 background and training.

14 THE COURT: I'm not worried about that. What's his
15 substantive evidence that he's going to be offering?

16 MR. VERHAREN: He's going to be offering an exhibit that
17 essentially charts the wave sounds of part of the 911 tape as
18 well as an enhanced audio CD, a part of the 911 tape, the last
19 part of the 911 tape. Those are the two exhibits he's going
20 to introduce. Essentially he's going to state, based on his
21 experience, what he did is he used a computer program with a
22 copy of the digital 911 recording, he took that recording and
23 took out background noise, took out things that weren't part
24 of the event and tried to bring out events that happened,
25 mainly the crashing noise and what he calls percussive

1 incidences, and he attaches a time line to them based on the
2 call and the computer program. That's essentially what he's
3 going to talk about.

4 MR. SCHWARTZ: Your Honor, and that's exactly why we
5 think we need to have this Daubert hearing. We need to know
6 what computer program was used, whether it's scientifically
7 accepted throughout the community, what his qualifications are
8 to run that program, and what the basis of his conclusions
9 are. This is key evidence here, Your Honor, that they're
10 trying to say that these are where the gunshots happened. If
11 he's going to testify about that, we need to know that it's
12 scientifically reliable before a jury hears that.

13 THE COURT: If I understood correctly is this the exhibit
14 that's already been admitted?

15 MR. VERHAREN: Yes.

16 MR. SCHWARTZ: No, Your Honor, this is an enhanced copy
17 of the 911 tape. This is not what's been admitted.

18 MR. VERHAREN: It's what's been admitted
19 without some of the background noise. It's an enhanced copy
20 of the last part of the 911 call.

21 MR. SCHWARTZ: So it's clearly --

22 THE COURT: Hold on just a minute. Is the exhibit, is
23 this witness going to testify regarding an exhibit that has
24 yet to be admitted?

25 MR. VERHAREN: Yes.

1 THE COURT: Okay, that's what I was trying to find out.
2 Because if he's testifying about what he did to enhance the
3 one that's already been admitted, then I don't think we really
4 need to discuss a whole lot.

5 MR. VERHAREN: He worked off the one that's been
6 admitted.

7 THE COURT: All right, and so we're going to have another
8 exhibit that you're going to be offering based upon the
9 expertise that he lended in evaluating this exhibit, is that a
10 fair statement?

11 MR. VERHAREN: Yes, sir.

12 THE COURT: Okay, fine. Let's bring your witness forward
13 and we'll visit with the witness for a few minutes.

14 THE COURT: Good morning, sir.

15 ERIC HARTMANN: Good morning.

16 THE COURT: How are you today?

17 ERIC HARTMANN: I'm doing well, thank you.

18 THE COURT: If you will raise your right hand, the clerk
19 will administer the oath.

20 ERIC HARTMANN:

21 was called as a witness on behalf of the
22 State, having been first duly sworn, was
23 examined and testified as follows:

24 THE COURT: Go ahead and have a seat, please.

25 Go ahead, Mr. Verharen.

1 MR. VERHAREN: Thank you, Judge.

2 DIRECT EXAMINATION

3 BY MR. VERHAREN:

4 Q. Sir, please state your full name.

5 A. Eric Arthur Hartmann.

6 Q. Can you spell your last name for us?

7 A. H-a-r-t-m-a-n-n.

8 Q. How old are you?

9 A. I am 35.

10 Q. Have you had any experience in terms of working with
11 recordings?

12 A. That is correct, I do.

13 Q. Can you describe that experience for us, please?

14 A. Certainly. I've been working in the audio and music
15 field for over 15 years. I currently have my own company with
16 my wife called fouled two turtles multi-media. In that company
17 we work on all sorts of different projects including audio
18 recording, mixing, mastering, enhancing, and so forth.

19 Q. Do you have equipment that you use as a part of your
20 business?

21 A. That's correct, I have a recording facility in my
22 home, professionally renovated my garage, and installed
23 microphones from \$100 to \$1,000, probably more than 20 of
24 them. Digital interfaces. I have a digital audio
25 workstation, also known as a daw, which I use for recording,

1 and thousands and thousands of dollars of outboard gear.
 2 Q. So is it often the case that you will get in a
 3 digital recording from a client?
 4 A. Quite frequently.
 5 Q. And oftentimes what do you do with that digital
 6 recording?
 7 A. I have done everything in the past from enhancement
 8 to mastering to editing.
 9 Q. What's enhancement?
 10 A. Basically taking a look at the file and listen to
 11 the client to see what they want to have done with it, but
 12 usually in involves reducing noise or reducing pops or
 13 squeaks, removing sounds, changing the length of the
 14 recording, so forth and so on.
 15 Q. What's mastering?
 16 A. Mastering is taking an audio file and basically
 17 bringing it to red book audio standards. It's a process that
 18 you sweeten the audio, make it sound better and basically get
 19 it ready for replication.
 20 Q. What's the other thing you did? You said, I
 21 thought, three things?
 22 A. Recording.
 23 Q. I guess that's self-explanatory. Do you have any
 24 kind of a degree associated with your work?
 25 A. I do. I have a B.A.S. from Arizona State

1 University. I've taken several university level classes in
 2 audio recording.
 3 Q. When did you get that degree?
 4 A. 2005.
 5 THE COURT: Excuse me, I'm sorry, did you say B.A.S.
 6 degree?
 7 WITNESS ERIC HARTMANN: Bachelors of Applied Science,
 8 B.A.S.
 9 THE COURT: Okay.
 10 Q. (By Mr. Verharen) At some point did you work for an
 11 organization called RMN?
 12 A. That is correct.
 13 Q. Can you tell us when you did that?
 14 A. That was approximately June through the middle of
 15 August of this year.
 16 Q. So based on your experience here as well as your
 17 education, can you tell us a little bit about sound?
 18 A. Certainly. To put it in simple terms, all sound is
 19 vibration. When, for example, voice is basically vocal chords
 20 that vibrate and move air, and that's what produces sound. In
 21 terms of recording, basically the way the information is
 22 recorded works in a similar fashion. Microphones, such as
 23 these, have a diaphragm in them that vibrates and then a
 24 magnet basically turns that information into electronic
 25 information which then can be passed on to analog tape or some

1 kind of digital medium.
 2 Q. So let's say a client has given you a digital
 3 recording and you're asked to do an enhancement of that,
 4 what's the first thing that you go about doing?
 5 A. The very first thing I do is take the file that they
 6 gave me from whatever media that they have and make a copy of
 7 it on to my copy.
 8 Q. Tell us about this computer?
 9 A. The computer that I use is really not that different
 10 from any other computer, but it's loaded with specific
 11 software that is used as a wav editor. And basically what
 12 that allows to you to do is take a look at the sound file
 13 visually as well as being able to listen to it and make
 14 adjustments to it.
 15 Q. So how long have you been using a computer like that
 16 and software like that?
 17 A. Over ten years.
 18 Q. On a regular basis?
 19 A. Yes.
 20 Q. When you go ahead and you put in your recording, how
 21 does it work in terms of the computer and the computer screen?
 22 A. Basically what happens is you take the file, make a
 23 copy on your computer and then you open it up into your wav
 24 editor. Your wav editor will actually make a graphical
 25 display of the wav form, which is just a visual representation

1 of what's happening with the sound on a digital level.
 2 So when you basically open it into the program, you
 3 have something to look at also along with listening to make
 4 judgment calls and what kind of enhancement you want to do.
 5 Q. And this thing that you're looking at, what does it
 6 represent?
 7 A. It represents the actual -- that the wav form itself
 8 represents the actual wav that the sound makes as it travels
 9 through the air. All noises, all sounds basically are
 10 transmitted in the form of a wav. So basically what you're
 11 seeing is the actual wave form itself in graphical
 12 representation.
 13 Q. And so you can listen to this thing and then you can
 14 watch it in the wave form on your computer screen?
 15 A. That is correct.
 16 Q. So let's say you want to make things clearer and
 17 take out some of the hissing noises and things like that, what
 18 do you do?
 19 A. The very first thing you do is you take a look at
 20 the wav form itself and you also listen to it and basically
 21 decide what types of enhancements that you need to do. There
 22 are lots of different enhancements you can do. Some of the
 23 most standard, first of all, is you can remove noise. There
 24 are generally two specific kinds of noises, one is called
 25 banded noise, one is called non-banded noise.

1 Banded noise is when something is frequency
2 specific. What I mean by that is all sound has a frequency
3 like musical notes. So some sounds are high in frequency,
4 some sounds are lower in frequency. There are some noises
5 called banded noises that only happen at a specific
6 frequency. A good example of this is 60 cycle hum, the noise
7 you get from electronics in a room. You can specifically go
8 in and remove those using this program.

9 Non-banded noises are noises that happen across the
10 frequency spectrum so they're not just in one specific tone,
11 they go throughout the frequency spectrum. Some types of
12 noise like that are wind and background noises. You can use
13 the program at that point to basically -- you can't ever
14 eliminate all noise from a recording, it's not possible, but
15 you can definitely reduce it using the system.

16 Q. By taking out that background noise, what are you
17 doing with the things that you want to listen to?

18 A. Basically what it does, specifically in banded and
19 non-banded sounds, what you do is you can zoom in on a track
20 and find an area that has no event data. So for example, a
21 silent period. You can use the computer to look at the
22 information that's in that "silent period" to find the
23 different types of noises that exist on the tape from whatever
24 background noise there is. The computer then writes an
25 adaptive filter to basically remove that from across the

1 A. That's correct.

2 Q. How long ago do you think that was?

3 A. I believe it was approximately two months ago.

4 Q. What was the specific request that you acted upon
5 from Sergeant Maskell?

6 A. Detective Maskell was looking for enhancement of the
7 tape of the digital file. I received three digital files from
8 Detective Maskell, which were the 911 calls, and he was
9 specifically looking for enhancement on the third file, which
10 he was looking for certain things that were relevant to the
11 case.

12 Q. So these files that you're talking about, they came
13 on one CD, computer CD?

14 A. That's correct, a CDR.

15 Q. CDR, and they had both the first 911 call and the
16 second 911 call?

17 A. That's correct.

18 Q. And you had three files, though, what do you mean by
19 that, if there was two 911 calls, why did you have three
20 files?

21 A. The second file was broken into two parts. So the
22 second call was actually two files, and the first call was its
23 own separate file.

24 Q. But they flow together on the second 911 call?

25 A. Yes, that is correct.

1 board. It does not affect the event data. So really all it's
2 removing are the noises that you're looking at during the
3 quiet parts when no events are happening.

4 Q. So when you're doing one of these enhancements
5 you're not actually taking out something that's actually
6 occurring there in terms of an incident?

7 A. No, likely what you're doing is you're removing
8 background noise to make the events more intelligible.

9 Q. When you go about doing this are you able to
10 establish a time line?

11 A. Certainly. When the file comes into the computer,
12 the file reads, it basically plays from zero forward. So if
13 you need to mark any kind of events in your data you can set
14 up cue points to basically tell yourself when things happen in
15 relativity to the beginning of the recording.

16 Some of the other things that I would do to audio
17 enhancement is work with the dynamics of the files. On the
18 wav forms, basically the taller the wav form, the louder the
19 event. The shorter the wav form, the quieter the event.
20 What you can do is you can run dynamics processing to make
21 some of the louder events appear quieter and some of the
22 quieter events to appear louder. That can also help assist
23 with intelligibility.

24 Q. Let me take you to this particular case. At some
25 point did you get a 911 tape from Sergeant Maskell?

1 Q. But in the computer file that contains that second
2 911 call, they're broken in two parts?

3 A. That is correct.

4 Q. What did you do in terms of preparing for this case?

5 A. Basically what I did was I made a forensic copy of
6 the file on any computer, and then I loaded it into a Dobey
7 Audition 1.5 which was the wav editor that I was using, and
8 then basically listened to all three of the files, even though
9 specifically Detective Maskell wanted me to listen to the
10 third one, but I did listen to all three.

11 Q. Why did you do that?

12 A. Just to make sure there was no other important case
13 related data on those files.

14 Q. What were you specifically looking for when you
15 listened to all of the files?

16 A. I was looking for, at Detective Maskell's request,
17 anything that would be consistent with gunfire.

18 Q. What's the term percussive incident?

19 A. Basically percussive incident is an audio incident
20 that happens extremely quickly. Some things that could be
21 categorized as a percussive incident would be somebody
22 striking a drum, somebody using a hammer to strike an object,
23 or a gunshot. It's something that happens extraordinarily
24 quickly. All of the energy from the sound happens almost
25 immediately, and really nothing else happens after that except

1 possibly the sound reflecting off of objects that are in the
2 environment, and then they'll come back to the microphone, the
3 recording device.

4 Q. Did you do anything in preparing yourself to try and
5 locate the sound of a percussive incident related to gunfire
6 in this particular case?

7 A. I did. I used several different types of gunshots
8 as basically a reference point so I could try to pick out
9 things that would be consistent with that type of audio event.
10 I listened to, I would say, 10 to 12 files of different types
11 of gunshots in given environments.

12 Q. And so then you went through the two 911 calls
13 looking for those?

14 A. That's correct.

15 Q. Let me turn your attention to focusing on the third
16 file, the second half of the second 911 call. What did you do
17 in order to enhance that particular recording?

18 A. The three basic steps I took were, number 1, I used
19 an adaptive filter to get rid of some of the background noise.
20 Number 2, I used a normalized function so that the file would
21 be the loudest it possibly could be without distorting. And
22 number 3, I used dynamic processing, specifically compression,
23 to bring some of the quieter sounds up to the forefront.

24 Q. Is this a process that you have been using over the
25 last ten years?

1 A. That's correct. The reference starts when the file
2 starts at zero, and then basically counts forward in minutes
3 and seconds, and you can basically identify times at which
4 different events took place using a cue list or a different
5 aura marker.

6 Q. So in this particular case you created a -- your
7 computer had on its screen a diagram of the wav sounds of that
8 portion of the 911 call, right?

9 A. That's correct.

10 Q. And you were focusing on a cue to begin your
11 analysis, is that right?

12 A. That's correct. Detective Maskell asked me to
13 specifically listen and look after a vocal cue from Joleen
14 Larsen, which was: Oh, my God, he's turning around.

15 Q. And so then the screen on your computer that's
16 showing these wav sounds focused on the part after that, is
17 that right?

18 A. That's correct.

19 Q. You have in front of you what's been marked as
20 Plaintiff's 144, can you tell us what that is, please?

21 A. I certainly can, that is a screen shot of the wav
22 file in a Dobey Audition 1.5.

23 Q. And is that how it looked on your computer screen as
24 you were working with this 911 call?

25 A. That's exactly how it looked. You can use Windows

1 A. Yes.

2 Q. How many times do you think you have done something
3 like this?

4 A. Hundreds, maybe thousands.

5 Q. And you followed the procedures you typically follow
6 when you're going about this type of process?

7 A. That is correct.

8 Q. While you were doing this, was the process on a
9 screen in front of you?

10 A. That is correct.

11 Q. At some point you have the wav sounds of this
12 portion of the 911 call on the computer screen in front of you?

13 A. That's correct.

14 Q. Can you describe what that looked like?

15 A. Absolutely. Basically the computer displays the wav
16 form in a graphical form. So basically as you're listening to
17 the event, either through headphones or on a monitor, you can
18 actually see the event play in the graphical form. So while
19 you're listening to it and hearing it, you can actually see
20 the graphical representation as it plays through.

21 Q. And is this something that you see whenever you do
22 this particular program to enhance a recording?

23 A. Every time.

24 Q. Is there a time reference to the wav sounds that
25 you're seeing?

1 to capture what's on the screen using the screen print
2 function and save it as an external file, which is what I did.
3 So this is exactly what I was looking at.

4 Q. Can you, using your pointer there, just take us
5 around everything that you have got marked or written there
6 and describe what it is, please?

7 A. I certainly can. I'll start with the time stamp
8 down at the bottom. You'll notice it's set right there at
9 zero point zero zero. You will notice that the little arrow
10 here, the cursor, is around all the way back to the beginning
11 of the recording, so it's displaying zero zero. As you play
12 the file this would advance forward and it would also advance
13 the time forward.

14 This is the actual wav file itself on the screen and
15 it goes up and down like a wav and basically shows the
16 different audio events as they happen. This is called the
17 play head. And as the play head advances there is also a line
18 that goes up the screen to the other play head so you can
19 watch it as it moves forward. So as you're listening you can
20 see what part of the wav file you're at, identify different
21 times by the time stamp and watch it move forward as you're
22 listening to it.

23 Q. And so you've got it at zero there, and zero being
24 the spot where the words what happened on the 911 call?

25 A. Zero is just the beginning of the file, it's the

1 very, very beginning of the file.

2 Q. The second half of the second 911 call?

3 A. That is correct.

4 Q. All right. And so up on the right side of that you
5 have got some things written down, can you explain that for
6 us, please?

7 A. I sure can. The first thing that I identified was a
8 vocal cue which was: Oh, my God, he's turning around. That
9 occurred one minute thirty-two seconds point 350 into the
10 recording. So as it plays forward, it would be at one minute
11 and thirty-two seconds.

12 Q. Can you show us where that is in terms of the
13 wav form?

14 A. I sure can. All of the times are marked forward in
15 10 second increments, so it would be approximately there.

16 Q. What else is below the vocal cue?

17 A. I then identified a crashing incident that was heard
18 in the recording, which happened from one forty-five point
19 four to one forty-seven point 076. I used this line to mark
20 it here. You will notice that there is two sets of dotted
21 lines and that's basically a cue from the cue list that I used
22 to mark the audio event.

23 So starting at the first dotted line and going to
24 the second dotted line is this time frame right here one
25 forty-five. Following it down here to one forty-seven.

1 Q. And you have given it a descriptive term to that two
2 second time period, can you tell us why you give it that
3 particular descriptive term?

4 A. I called it a crashing incident because it's
5 approximately two seconds long, one point six seconds. It's
6 an extended loud crashing sound. It has a very metallic sound
7 and it's very loud on the tape.

8 Q. What's below that?

9 A. Is percussive incident number 1 which occurred at
10 one minute forty-five point 442 going to one minute fifty-two
11 point 533.

12 Q. And how did you come up with that particular term in
13 that particular instance there?

14 A. What I was looking for specifically in the recording
15 were percussive incidents, things that could be consistent
16 with a gunshot. This was the first one that I found. It's a
17 loud sound that happens very, very quickly, all of the energy
18 in the sound happens almost immediately and then trails off
19 very, very quickly.

20 Q. And so based on your research into this matter, is
21 that percussive incident there you have first marked, is that
22 consistent with the other sounds of gunfire that you got
23 accustomed to?

24 A. Yes, it is.

25 Q. Okay, what's below that?

1 A. Percussive incident number 2 from two minutes

2 thirteen point 081 to two minutes thirteen point 471.

3 Q. Okay, and then you've got three more in there?

4 A. That's correct.

5 Q. I don't know if we need to go into that right now.

6 That image there that's generated, that's an accurate image
7 off your computer screen?

8 A. That's correct.

9 Q. And the time line that you have got there
10 delineated, that's the same time line that was on your
11 computer screen?

12 A. That is correct.

13 Q. And this particular thing you have generated for us,
14 this is something you have done hundreds of times?

15 A. Yes.

16 Q. You also then generated a recording?

17 A. That is correct.

18 Q. Let me show you what's marked as 152, do you
19 recognize that?

20 A. I certainly do.

21 Q. What do you recognize that to be?

22 A. I recognize it because I have my initials always on
23 here, and this is the recording that I worked on.

24 Q. So how did you generate that recording? I realize
25 you talked a little bit about how you generated that diagram,

1 but can you tell us how you generated the recording?

2 A. Certainly. It was as simple as basically saving
3 this wav file that I enhanced onto a CD.

4 Q. So what we're looking at there in terms of 144, you
5 simply saved in audio copy on that CD?

6 A. That is correct.

7 Q. What's the difference between that exhibit 152 and
8 the original 911 digital call?

9 A. The difference in this recording and the first
10 recording are basically the steps that I took, which is using
11 an adaptive filter to remove the background noise, using the
12 normalized feature to make sure that everything was at a
13 maximum volume that it would be without distorting, and using
14 dynamics processing to make loud noises quieter and make quiet
15 noises louder so things that were in the background could be
16 heard more clearly.

17 Q. And that's the only difference?

18 A. Yes.

19 Q. About how long is that?

20 A. The recording is approximately just over four
21 minutes.

22 Q. Does it have anything on the tail end of it? After
23 the recording is over, is there something else on there?

24 A. No. When the file ends right there, that is all
25 that was available to me.

1 Q. Okay. I guess my question is 152 the actual
2 enhanced 911 call, it ends, and is there something after
3 that?
4 A. I do not believe so, no.
5 Q. On the call in terms of the events generated?
6 A. Basically what you're saying here is the beginning
7 of the second half of the 911 call, and when the call ends
8 here there is no more information after the call has ended.
9 Q. I think I'm asking the question the wrong way.
10 A. Okay.
11 Q. You can listen to that part of the call there on
12 this recording, right?
13 A. Yes.
14 Q. And after that gets done, there is something else
15 that's on the recording, right?
16 A. Not that I'm aware of.
17 Q. These particular instances here, the crashing and
18 the five percussive incidences, the six things, are they on
19 that?
20 A. Yes.
21 Q. Are they separate from, have you separated them?
22 A. Now I understand your question. Yes. On a separate
23 file I also isolated each of the incidences, not the vocal cue
24 but the actual cues here. So I made a separate file that also
25 will play the crashing incident isolated, the percussive

1 composer?
2 A. Not necessarily, depends on what I'm working on. I
3 have done some composing in the past. I have done some song
4 writing, I've done a lot of different things. But I do quite
5 a bit of audio recording for musical acts. I've also done
6 voice-over in the past, and I do a considerable amount of wav
7 editing in terms of mastering and manipulation.
8 Q. Have you ever testified as an expert before?
9 A. I have not.
10 Q. What is your bachelors degree in?
11 A. It's a bachelors of applied science, my focus was
12 visual arts.
13 Q. Visual arts?
14 A. That's correct.
15 Q. So you don't have a degree in sound editing?
16 A. I have taken classes in sound editing, but, no, my
17 degree is in visual arts.
18 Q. Are there degrees in sound editing?
19 A. Yes.
20 Q. But you don't have one?
21 A. No, I don't.
22 Q. Are you a part of any scientific communities or
23 organizations regarding sound editing?
24 A. Audio Engineering Society.
25 Q. What position do you hold in that?

1 incidents also I have isolated. They're put on a file one
2 second apart. So when you play the CD, after the first one is
3 done, there is a second file put into an audio format that
4 will play the crashing incident and the percussive incidents
5 one through five.
6 MR. VERHAREN: All right. Move to admit 152 and 144.
7 THE COURT: I don't know that I'm prepared to admit right
8 now. I think we're possibly going to have to do the thing all
9 over again in front of the jury, but I take it you're done
10 with your questioning.
11 Go ahead, Mr. Schwartz.
12 CROSS-EXAMINATION
13 BY MR. SCHWARTZ:
14 Q. Good morning, sir.
15 A. Good morning.
16 Q. So I think you testified that you have done work for
17 the music industry?
18 A. That's correct.
19 Q. What about movies?
20 A. I have done some work for video, not necessarily
21 movies.
22 Q. Like a music video?
23 A. I have done some music videos, yes, also some
24 independent features.
25 Q. So to a large extent what you do is kind of like a

1 A. I'm just a member. It's a society, I use it for
2 fact finding, I do a lot of research independently on this
3 matter. There are schools that you can go to to become a
4 recording engineer. They're quite expensive, and to be
5 honest, they are not as good as I would like to spend my money
6 on, so I do a considerable amount of research on my own.
7 Q. Does this association that you're in, does it have
8 set out guidelines or standards for the procedures that should
9 be used to do enhancements for criminal trials?
10 A. No, it does not.
11 Q. Are you aware of any organizations that have
12 standards that can be used to make scientifically reliable
13 determinations for sound enhancement?
14 A. I am not aware of any such organization.
15 Q. While you were testifying, you started talking about
16 these steps that you go through, and you said there's several
17 different enhancements that can be used to enhance a certain
18 sound recording?
19 A. Correct.
20 Q. You make what you testified to as a judgment call as
21 to what enhancements you're going to use on a particular sound
22 file?
23 A. That is correct.
24 Q. Two different people in your position might use two
25 different enhancements in order to reach whatever the enhanced

1 recording would be?
 2 A. That is correct.
 3 Q. So in essence two different people in your position
 4 could come up with two different enhanced recordings?
 5 A. That is correct.
 6 Q. You testified about some software programs that you
 7 used to make this enhancement?
 8 A. Yes.
 9 Q. What are those programs?
 10 A. This particular program is a Dobey Audition 1.5.
 11 Q. When you say this particular program, that makes me
 12 think that there might be other programs that could be used to
 13 do this?
 14 A. There are.
 15 Q. What other programs are there?
 16 A. Sound Forge. You could also use Pro Tools, Sonar,
 17 Nuendo, there are a number of audio editing programs.
 18 Q. And why do you use this particular one?
 19 A. It is the program that was furnished to me by RMIN.
 20 Q. So it's not even your choice, you were provided this
 21 program?
 22 A. The programs, generally speaking, work about the
 23 same. To make a simple analogy, it's sort of like word
 24 processors. They basically work with the same functions even
 25 though the programs themselves are different.

1 Q. But if you use two different programs would you come
 2 up with a possibly different recording?
 3 A. Yes.
 4 Q. So while you're going through making these judgments
 5 calls, there are some enhancements that you decide not to use
 6 and some enhancements that you decide to use?
 7 A. That's correct.
 8 Q. So again it's sort of like you're composing the
 9 recording as you see it?
 10 A. I wouldn't personally use the word composing, but I
 11 do analyze the recording and make judgments based on my
 12 analysis.
 13 Q. And are there set guidelines what you should base
 14 that judgment on?
 15 A. No, there are not.
 16 Q. Looking at that diagram there, you have pointed out
 17 some of the places where you think incidents occurred?
 18 A. That's correct.
 19 Q. And where the point points is actually where the top
 20 of that wave is actually the beginning of any sound you're
 21 talking about, right?
 22 A. The arrows point to the cue, which are the audio
 23 incidents between the different time frames.
 24 Q. So that's the start of the sound and the lines going
 25 up and down are the waves proceeding from that point?

1 A. Yes, the lines going up and down are the cues and
 2 then it's the waves inside, that's correct.
 3 Q. So you have to actually look at that and interpret
 4 those different wave lengths in order for you to estimate where
 5 the sound is on there?
 6 A. In addition to listening to the file, yes, I do use
 7 the graphical information to base my decisions upon.
 8 Q. So it's your decision. If another person looked at
 9 this without your markings, could they possibly make different
 10 notations as to what sort of wave length sound that is?
 11 A. I'm sure they certainly could have, yes.
 12 Q. And is there any set guidelines that you could use
 13 to sort of make a standard decision about what that kind of
 14 sound is?
 15 A. No.
 16 Q. If I could get five people like you that do this
 17 kind of work in a room, and you all listened to that, it's
 18 quite possible that all five of you would have different
 19 opinions as to what those sounds were?
 20 A. It is possible.
 21 Q. And you talked about percussive incidents?
 22 A. Yes.
 23 Q. So that's not necessarily a gunshot, that's any
 24 sound that sort of goes on certain wave length?
 25 A. That is correct, yes.

1 Q. And different people could identify different
 2 percussive incidents?
 3 A. If we were looking at the situation you were talking
 4 about and sat five people down to listen to this, I think all
 5 of them would agree with me that the sounds that I have marked
 6 are in fact percussive incidents. I don't know as if there is
 7 necessarily any -- I don't know how much leeway there is in
 8 the analysis of it. It's like anything else, if you hold up a
 9 sign with the color blue painted on it and ask five people
 10 what color is this, it is possible somebody might say that's
 11 aqua. But if you say is aqua blue? Well, yes, it is. I
 12 would like to think that five experts would identify those as
 13 percussive incidents.
 14 Q. That's what I'm getting at is this is your opinion,
 15 not science, it's not like a chemical compound that five
 16 different scientists can go that's that chemical. This is
 17 your opinion based on what you have observed?
 18 A. To that degree everything is my opinion based on
 19 what I observe. I'm not sure I'm comfortable not calling it
 20 science because you can look at the actual wave form itself
 21 but everything is open to a certain amount of interpretation,
 22 yes.
 23 Q. When you received this information, the state
 24 directed you what they were looking for?
 25 A. To a certain degree, yes.

1 percussive incidents, however, I tried to rule out breaths
2 because breaths generally take longer when somebody breathes
3 into a microphone. Generally takes a certain length of time.
4 Percussive incident generally happens very, very quickly. So
5 I tried to eliminate the breath sounds from that, but it is
6 entirely possible, yes, that one of the breaths sounds could
7 have hidden something behind it.

8 Q. In regards to these incidents, I'm looking at your
9 diagram here, they're not the same length?

10 A. No, they're not.

11 Q. Why is that?

12 A. Part of it is just because you have to -- when
13 setting up the cues, basically I set up it approximately the
14 beginning and approximately the end. There is no way to
15 specifically set up the cues to be exact from the beginning of
16 a sound to the end of a sound, therefore, I just use my
17 judgment to set the cues up to give a representation of where
18 the sounds were. The cues are not an indication of exact
19 length, they're an indication where in the time line an
20 incident approximately happened.

21 Q. So a different person might set the cues in a
22 different place?

23 A. Slightly different, yes.

24 Q. And a different person might describe those as
25 happening in different periods?

1 A. That's correct.

2 Q. What type of guns did you use?

3 A. A variety of gunshots. I used an audio CD that I
4 have that I've used in the past which has a variety of
5 gunshots and basically used those. Obviously I had no
6 information on what type of gun was fired nor did I have
7 exact information about the environment that it was fired in.
8 So all I could really do is look at the class characteristics
9 of a gunshot, which is a percussive incident, something that
10 happens very, very fast, energy in the front and goes off
11 very, very quickly.

12 Q. And so then you used these sort of classic
13 descriptions of classic sounds of a gunshot to compare, look
14 for gunshots or percussive incidents on there?

15 A. That's correct.

16 Q. So two different people listening to those could
17 make different determinations about what sounds more like
18 those gunshots?

19 A. That is possible, yes.

20 Q. So really this is all about your judgment about
21 sounds?

22 A. Certain characteristics can be gained using
23 appropriate analysis of the different items that I was looking
24 at. Anytime that you're dealing with analysis, you are
25 dealing with a certain amount of artistry. I don't agree that

1 A. Slightly different time periods, yes.

2 Q. And time periods are the basis that you're using to
3 distinguish between breath sounds and percussive incidents?

4 A. If someone listened to it they might possibly say
5 that percussive incident one happened at one minute fifty-one
6 seconds point 586. It could be two-tenths of a second
7 further. I have to pick an arbitrary time to start the cue.
8 I have to pick an arbitrary time to end the cue. It is
9 exactly what it says, it's a cue. It's not an exact --
10 there's no exact information on what happened and when.

11 Q. Sounds pretty artistic particular to me.

12 MR. VERHAREN: Objection, relevance.

13 THE COURT: Sustained, unless that's a question.

14 Q. (By Mr. Schwartz) Do you find it artistic?

15 MR. VERHAREN: Objection, relevance.

16 THE COURT: That's a fair question, you can answer the
17 question.

18 A. Artistic, no. Give someone a piece of paper and
19 tell them to draw a line on the piece of paper, they're going
20 to draw in a slightly different spot. No matter how exact a
21 human being is, there's always going to be a slight amount of
22 give and take. I set the cues up so that the gunshot was in
23 the cues.

24 Q. You testified that you got some sound slips of other
25 gunshots?

1 it's complete artistry, but there is a certain tremendous
2 amount of artistry involved certainly. In classifying a
3 gunshot as a percussive event I don't think that another audio
4 expert would disagree with me describing it as an event that
5 has energy in the front that happens very quickly. I don't
6 think they would disagree with me on that either. In terms of
7 matching one sound to another using the graphic representation
8 of visual and also using the audio representation, yes, there
9 is some artistry to that, yes.

10 Q. And let's say there was different types of guns
11 fired, you wouldn't be able to tell the difference between
12 those types of guns?

13 A. I wasn't looking to tell the difference between the
14 types of guns. I was looking to set up a general class
15 characteristic for a gunshot. There is no possible way to
16 match because of environmental factors, recording factors,
17 there is no way to match a specific type of gun to one used in
18 a recording. Any type of recording that's made with a
19 different type of microphone will affect it, a different
20 environment will affect it, so basically what I was looking
21 for are class characteristics, things I could take from it in
22 terms of what it might sound like in this circumstance, what
23 it would be consistent with.

24 Q. Gunshots aren't the only things that could be these
25 percussive incidents, correct?

1 A. That is correct.

2 Q. What else could it be?

3 A. It could be somebody hitting a piece of metal with a
4 hammer, somebody striking a drum. Any kind of sound that has
5 the initial energy in the very, very beginning very, very
6 quickly.

7 Q. What about two cars hitting each other?

8 A. That would be highly unlikely. Two cars hitting
9 each other would take a longer period of time, it would not be
10 percussive. It would be a loud sound, but as two cars would
11 come in contact with each other, the length of the sound would
12 almost definitely be considerably longer than a percussive
13 incident.

14 Q. What about a car door opening and closing?

15 A. A car door closing possibly, although it probably
16 would not have the volume or the metallic characteristic that
17 the percussive characteristic due to the fact that a car door
18 has a rubber gasket seal on it.

19 Q. What about an air bag inflating?

20 A. I have personally never heard an air bag inflate. I
21 have never listened to audio of an air bag inflate, I do not
22 know what is involved with an air bag inflating, I have no way
23 to make a comment on that.

24 Q. So given all those examples that I just gave you, if
25 three different people in your field listen to those different

1 references to encapsulate what's happening. It's more for
2 reference, not an exact thing. With the percussive incident,
3 when you here it, it happens and then it's done. With the
4 crashing incident it looks longer to happen.

5 Q. So those times on there that you have listed aren't
6 exact?

7 A. No, they are cues.

8 Q. That you set up?

9 A. That I set up, that is correct.

10 Q. That you now use to distinguish between a crashing
11 incident and a percussive incident?

12 A. I don't use them to distinguish between them, I use
13 them to label them so that somebody could listen to it and
14 know when approximately the incident starts and approximately
15 when the incident ends.

16 MR. SCHWARTZ: I have no further questions, Your Honor.

17 THE COURT: Mr. Verharen.

18 MR. VERHAREN: I don't have any other questions, Judge.

19 EXAMINATION

20 BY THE COURT:

21 Q. Mr. Hartmann, you have described a number of things
22 that you do in your profession. Are all these within the
23 realm of audio engineering, as it were, is that a fair
24 statement?

25 A. Yes, they are.

1 sounds, you could all reach different conclusions about
2 whether or not they were percussive incidents?

3 A. Like I said before, I don't know if anybody could
4 disagree that the incidents that I labeled are percussive
5 because in fact they are percussive, means that they are loud,
6 happened very quickly and basically dissipate very quickly.

7 Those sounds I don't think anybody could describe as not being
8 percussive, especially anyone who is an audio engineer.

9 Q. That wasn't my question, sir. My question was
10 identifying something as percussive, other sounds that are on
11 this tape, others could identify as percussive incidents, like
12 a car wreck?

13 A. Again, as I said before, a car wreck, a car crashing
14 would take a longer period of time. It would sound longer, it
15 would appear longer than a percussive incident, so I don't
16 think a different audio expert would come to a different
17 conclusion on that matter.

18 Q. On your model here you have the crashing incident
19 happening at about what, 1.6 seconds?

20 A. 1.45.4 going to 147.07.

21 Q. And so that's .3 seconds longer than the first
22 percussive incident?

23 A. No, first the percussive incident, let's see. As
24 labeled on the chart it appears that way, but remember, when I
25 set up the cues, the cues are just visual references and audio

1 Q. You have described a number of computer programs
2 that may be used to do the wav editing that you have testified
3 to here at length, and you have also testified as to how
4 various experts in this field might apply their own judgment
5 in terms of a variety of different conclusions or
6 characterizations. And so with that preface is this computer
7 programming or similar computer programming that you have
8 utilized and the approach that you have taken in accomplishing
9 this editing process, if you will, is this the method that's
10 typically used by audio engineers in the field, as you
11 understand it?

12 A. As I understand it, yes.

13 Q. Do you know of any other method or any other
14 approach that an audio engineer would take to accomplish the
15 same task that was requested of you by the state in this
16 particular case?

17 A. No. There is going to be slight deviations in
18 everyone's process. But the basics of the process I would
19 assume to be the same with a different person in my same
20 position.

21 Q. And are you familiar in terms of utilizing this
22 process whether there is understood within the field a degree
23 of reliability from this approach that's been utilized?

24 A. I know that this type of enhancement has been, for
25 several years with digital enhancement, has been used in a

1 courtroom setting like this. In terms of scientific
2 reliability, I'm not sure something of this nature can be
3 measured by that. I have not seen any studies that give
4 numbers or data reflecting the reliability of these processes.
5 However, I do know that these processes have been used for
6 many years and they are industry standard.

7 Q. If I understand, and I think you made that pretty
8 clear, when you're looking for percussive incidences, you're
9 also listening simultaneously for percussive incidences, so I
10 take it that these percussive incidences to some extent can be
11 audible to the ear?

12 A. Yes, that is correct.

13 Q. And the wav signals that you have testified to here
14 are typically consistent with what you hear, is that a fair
15 statement?

16 A. That is correct.

17 Q. And to the extent that we might be talking simply
18 about percussive incidences that you're trying to make a
19 determination from a particular file, do you have an opinion
20 as to the degree of reliability that this technology provides,
21 if you understand that question?

22 A. I can. My opinion is that it is fairly reliable. I
23 would actually say that it's better than fairly reliable, I
24 would say it's very reliable. This particular case with the
25 amount of screaming and background noise did prove to be

1 Q. So my next question then would be that if you were
2 in some kind of a studio setting, if you will, and you had the
3 opportunity to discharge a known firearm and record the event
4 on your wav, would that wav leave a distinct enough pattern
5 that if you were to do it again that it would be identical?

6 A. If you took a weapon into a monitored room that was
7 set up for such an activity, fired it once and then used the
8 same room to fire it again, they would be extraordinarily
9 close. But there are many factors in sound, and if the
10 position in the room is slightly different than the other
11 position, then it would be somewhat different. But we are
12 talking very small degrees.

13 Q. So even in that kind of an arrangement you still
14 wouldn't be in a position to say that, yeah, that second
15 percussive event was in fact a gunshot from the .22 caliber
16 pistol that we shot earlier? You could say it was similar but
17 you couldn't conclusively say, yes, that's exactly the pattern
18 of a .22 caliber bullet shot under those conditions?

19 A. I don't think you can. I'm not sure any audio
20 engineer or audio expert could. So much with sound has to do
21 with environment. Me speaking in this room is going to sound
22 entirely different than me speaking in another room, which is
23 why it's tough to make voice analysis off of tapes.

24 Now, a lot of it from a scientific standpoint may be
25 difficult, but from an intuitive standpoint, if you heard me

1 somewhat more challenging than others that I have worked on,
2 however, I still confident that the steps that I took gave me
3 the most reliable outcome that I would have gotten.

4 Q. If a particular incident, audio incident involved
5 two simultaneous percussion incidences occurring, is there any
6 way that this process can discern between those two? In other
7 words, could one than simply cover up the other?

8 A. That is correct, it could happen. In the case of
9 somebody, for example, relating to this case, breathing into a
10 microphone very heavily, it is possible that there is
11 information being obscured by it. But it's a possibility.

12 There is no way to measure probability for such an event.

13 Q. If I understand your testimony correctly, what you
14 have done here and the wavs that you have examined that you
15 cannot necessarily tell me that a particular sound is in fact
16 a gunshot, is that a fair statement?

17 A. That is a very fair statement.

18 Q. You can only tell us that it's percussive incident,
19 is that a fair statement?

20 A. That is correct, I can say that it is a percussive
21 incident. I can say that a percussive incident is consistent
22 with a gunshot, but I cannot say it's a gunshot. To be quite
23 honest, unless I was at the scene using audio for reference,
24 it is very hard to determine that anything is exactly
25 anything.

1 talking in five different locations and you knew it was me,
2 you would know it was me on the tape. But it's also possible
3 somebody might have the same voice that I do or something
4 similar enough to fake someone. So because I was not there
5 and cannot watch, all I can really do on any kind of audio or
6 even video data is basically look at characteristics and
7 determine what is consistent and what is inconsistent.

8 THE COURT: Thank you very much, Mr. Hartmann.

9 Do you have any additional questions in light of my
10 questions, Mr. Verharen?

11 MR. VERHAREN: No, Judge.

12 THE COURT: Any other questions, Mr. Schwartz?

13 MR. SCHWARTZ: No, Your Honor.

14 THE COURT: Thank you very much. Don't go anywhere,
15 we'll still visit with you here in a minute.

16 Go ahead, Mr. Schwartz.

17 MR. SCHWARTZ: Your Honor, I think it's clear under the
18 Daubert standards that this testimony is not going to apply
19 and won't be able to assist the jury. Additionally note, Your
20 Honor, that by allowing this witness to testify without this
21 sort of scientific reliability would result in the highly
22 prejudicial occurrence where he's telling the jury that these
23 are where the possible gunshots are and they're not anywhere
24 else, when it's clear that he can't actually testify to that.

25 So I would just point out that the standards in

1 Daubert, Your Honor, the first is whether the theory or
2 technique can be and has been tested. There has been no
3 testimony here about any sort of objective way of testing this
4 expertise or these analysis. In fact he clearly said that
5 even if you did the exact same controlled circumstances twice
6 in a row, there would still be a difference between them, and
7 that's clearly it can't even be tested and that's because it's
8 not science.

9 The second standard, Your Honor, is whether it has
10 been subject to peer review or publication. There has been no
11 testimony about peer review or publication going on, in fact
12 his testimony is that the only association he's a member of
13 has no objective standards or guidelines used to guide this
14 sort of testimony, so clearly that standard is not met as
15 well, Your Honor.

16 Next is whether there is a high known or potential
17 rate of error. I think this is very important in this case,
18 Your Honor. He has testified that even by himself, even with
19 just his arbitrary and judgment decisions that two different
20 sounds at the same time could sound different, that there's so
21 many variables that it's impossible to get the same outcome
22 twice. And that is clearly we know there's a high rate of
23 error if there's two different people doing this analysis and
24 setting up the cues, there's going to be two different
25 analysis, and that is clearly not reliable enough under

1 Daubert to put it in front of a jury, it's too prejudicial.

2 Your Honor, I think the real question here is
3 whether this is science or whether this is art to some extent.
4 He has testified that it's his judgment that sets up the
5 program. It's his judgment that determines the parameters of
6 the program. And then it's his judgment that identifies the
7 outcome of the program. There is no objective way of
8 evaluating this "science". Here's no objective way of
9 testing the conclusions that he came to. It's clearly
10 completely a subjective decision based on his analysis, not
11 based on any objective or reasonable scientific standards. To
12 allow this testimony to go in front of the jury is simply to
13 throw out this person's opinion, not science, and tell them
14 this is the only time that there could have been percussive
15 incidents.

16 And clearly that's prejudicial, Your Honor, when
17 it's clear from his testimony here today that there's no
18 guidelines, there's no objective standards, there's no peer
19 review, there's no set reliability. And he even said that
20 it's not clearly reliable.

21 Your Honor, I just think under Daubert this cannot
22 be allowed as expert testimony.

23 And additionally, Your Honor, I don't think that
24 even if this was qualified under Daubert, I don't know that
25 this witness has been qualified as an expert. This is the

1 first time he's testified. He just got his degree in 2005.
2 There's been no testimony about publications that he's done or
3 prior expertise that he's had, it's simply that he was in the
4 music business. And I don't think that qualifies himself as
5 an expert even if you find that the science is reliable enough
6 under the Daubert standards.

7 THE COURT: Mr. Verharen.

8 MR. VERHAREN: Judge, I think I have laid the foundation
9 and this evidence ought to come in.

10 THE COURT: I have retrieved State versus Perry, and I
11 recognize, as I have in other cases, that the Daubert standard
12 has certainly been discussed. But I'm not sure to my
13 understanding that the state of Idaho has really adopted
14 specifically and has applied Daubert. It certainly is helpful
15 in evaluating admissibility of evidence under Rule 702 and
16 Rule 703 of the Idaho Rules of Evidence.

17 Primarily a scientific technical or otherwise
18 specialized knowledge would assist the trier of fact to
19 understand the evidence or determine a fact in issue, a
20 witness qualified as an expert by knowledge, skill,
21 experience, training or education may testify thereto in the
22 form of an opinion or otherwise.

23 Under Rule 703 the facts or data in the particular
24 case upon which an expert bases an opinion or inference may be
25 those perceived by or made known to the expert at or before

1 the hearing if of a type reasonably relied upon by experts in
2 the particular field in forming opinions or inferences upon
3 the subject, the facts or data need not be admissible in
4 evidence in order for the opinion or inferences to be
5 admitted.

6 We have made a number of inquiries of Mr. Hartmann
7 about his proposed testimony here. Mr. Hartmann certainly
8 does not have a degree in audio engineering, but there is
9 nothing in the rules that require what he has such a degree.
10 He may not have testified in court before. There certainly is
11 no requirement that that's a prerequisite to be a qualified
12 witness in court. There certainly has been some testimony
13 elicited about the methodology that he has utilized. However
14 while we haven't got into some of the direct questions, his
15 methodology appears from his testimony to be very consistent
16 with the methodology that is used by audio engineers who are
17 attempting to ascertain and determine the very things that
18 this witness has testified to.

19 Now certainly this witness has a certain amount of
20 input into the process that may ultimately impact a result. He
21 also has a certain opinion based upon the data that is
22 perceived that may vary from one expert to another expert.
23 Again I don't think that's the standard of admissibility that
24 is applied in scientific or other technical evidence that
25 would be offered to the jury. Otherwise I don't think that it

1 would be likely that much scientific evidence could be offered
2 because there always appears to be a difference of opinion
3 among scientists even as how evidence can be interpreted.

4 The ultimate question is really the reliability of
5 the evidence that is about to be offered to the court.
6 I think even under the Daubert consideration, the primary
7 concern was is that we were not basically presenting junk
8 science to the jury upon which they simply lacked the
9 appropriate scientific or technical reliability. I'm not
10 satisfied here from what I have heard that this witness has
11 really said this isn't reliable information. He set forth the
12 technology and methodology that he uses to determine certain
13 things that he's about to testify to.

14 I don't don't think, as he would agree with me, that
15 he could testify when a gunshot may have been fired or how a
16 gunshot may have been fired at a particular time, I should say
17 whether it was specifically a gunshot as opposed to a
18 percussive incident. But he certainly can lend some
19 assistance to the trier of fact in this particular case to
20 better understand the evidence. I think Mr. Schwartz has
21 certainly raised a number of questions about the process, but
22 I think those questions certainly go to the weight of the
23 evidence that this witness would be in a position to offer and
24 not necessarily to its admissibility.

25 So I think under the rules of evidence I'm satisfied

1 as the gatekeeper of this type of testimony and that there is
2 sufficient foundation laid that I'm prepared to go ahead and
3 I'll certainly allow this to proceed to the jury, and so I'll
4 certainly note the objection from the defense.

5 I'll allow to you continue, Mr. Verharen. Keep in
6 mind you will have to lay your foundation over in front of the
7 jury.

8 With that let's bring our jury in.

9 (Concludes without the jury present)

10 (JURY IS PRESENT)

11 THE COURT: I think we are ready to get under way. I
12 think we have called our next witness, and that is Mr. Eric
13 Hartmann, is that right?

14 MR. HARTMANN: That's correct.

15 THE COURT: We have already introduced Mr. Hartmann
16 outside the presence of the jury. He is already under oath.

17 And so with that, please proceed, Mr. Verharen.

18 ERIC HARTMANN

19 called as a witness on behalf of the state,
20 was previously duly sworn and was examined and
21 testified as follows:

22 DIRECT EXAMINATION

23 BY MR. VERHAREN:

24 Q. Mr. Hartmann, can you tell us what state you live
25 in?

1 A. I live in Arizona.

2 Q. You flew up yesterday for this trial?

3 A. That is correct.

4 Q. What do you do down in Arizona?

5 A. I am currently working in two different facilities.

6 I'm working currently at a company called Thompson doing
7 animations and additionally doing voice-over work and doing
8 audio editing and audio syncing. I also run a company called
9 Two Turtles in which I do any number of audio related projects
10 including audio recording, wav editing, mastering, mixing and
11 voice-over as well.

12 Q. How long have you been working in the audio
13 recording field?

14 A. More than 15 years.

15 Q. Describe what you have been doing the last 15 years
16 in that field, please?

17 A. Basically all matter of audio recording, mixing,
18 mastering. I have done some live sound, I've done voice-over,
19 I've done some composing. But what most of what I do is audio
20 recording and mastering, wav editing.

21 Q. Your business, does it have a bunch of equipment?

22 A. Yes, it does.

23 Q. Can you describe that for us, please?

24 A. Certainly can. I basically built my own studio. In
25 my studio I have microphones ranging from \$100 up to a

1 thousand dollars. I have a number of different digital
2 input-output devices, I use a computer workstation to do my
3 audio recording. It's also called a daw, digital audio
4 workstation. I have of lot of outboard gear as well, guitars,
5 bases, you name it, I have it. Thousands upon thousands of
6 dollars of musical and recording equipment.

7 THE COURT: Mr. Hartmann, if you could maybe slow down
8 just a little bit, our court reporter needs to be able to keep
9 up with you.

10 MR. HARTMANN: Certainly, I'll do my best.

11 Q. (By Mr. Verharen) Do you have clients then over the
12 last 15 years that have sent you recordings that they want you
13 to enhance or make sound better?

14 A. Yes.

15 Q. Can you describe how long you have been doing that
16 particular part of your work?

17 A. Well over five years.

18 Q. Does that include digital recordings?

19 A. Yes.

20 Q. How long have you been doing that?

21 A. Over five years.

22 Q. When you get a digital regarding from a client that
23 the client wants to you make sound better, what are you trying
24 to basically do with that recording?

25 A. Basically what I'm looking to do is enhance the

1 recording. I'm looking to reduce noises in the recording,
2 bring out intelligibility, sweeten the sound, remove any pops
3 or clicks that might be present. I can also do a number of
4 other audio events to it, shorten it, lengthen it, remove
5 sections, and so forth and so on.

6 Q. Do you do this process on a computer?

7 A. That is correct.

8 Q. Can you describe that computer for us, please?

9 A. Certainly. I, with the help of a friend, built my
10 own custom computer a few years back using top-of-the-line
11 products. At home I use a number of different softwares and
12 hardwares to do the audio recording and editing.

13 Q. When you go about doing this process of enhancing a
14 digital recording, describe for us the process that you take?

15 A. The first step in the process is basically to make a
16 copy of the original audio onto my computer. The next step is
17 to basically load it into the editor that I'm going to be
18 using, in this case it would be a wav editor. Then I'll sit
19 down with the client and take a look at what types of things
20 they're looking to do. I'll analyze the according using the
21 program to base my analysis on. What the program does is it
22 will actually display the wav form of the recording that has
23 been made in a graphical representation on the screen. I'll
24 then be able to listen to the recording as well as look at the
25 recording in its actual wav form basis.

1 Q. Do you have a degree?

2 A. I do.

3 Q. Can you tell us what that degree is in?

4 A. I have a bachelor or applied sciences from Arizona
5 State University.

6 Q. When you were getting that education, at some point
7 did you take any classes in audio recording?

8 A. I did.

9 Q. Can you briefly describe that for us, please?

10 A. I took several courses including a studio
11 engineering class, and I also took an independent study class
12 where I worked specifically in mastering and wav editing.

13 Q. Based on your work in this field, as well as your
14 education, have you come to an understanding of basically what
15 sound is?

16 A. Yes.

17 Q. Can you describe that for us, please?

18 A. In the simplest terms any sound is vibration. Human
19 voice, for example, are vocal chords that vibrate and they
20 move the air. The vibration, the movement of the air is what
21 creates sound. A recording is basically reverse engineering
22 of the same principal. For example, a microphone, like any of
23 these, has something in it called a diaphragm. As sound
24 passes over it as the vibration in the air moves over it, it
25 vibrates. And then the microphone uses technology basically

1 to turn that sound into either a digital or an analog
2 representation of that form.

3 Q. So jumping ahead to where we were in terms of using
4 your equipment to enhance a digital recording, when you're
5 going through the process on your computer, is that
6 represented on your computer screen?

7 A. That's correct, it is.

8 Q. Can you describe that for us, please?

9 A. Basically what it looks like is the computer will
10 take a look at the wave, it will analyze it, and it will put
11 up a graphic of the wav. And basically what it does is it
12 mathematically graphs out exactly what you're hearing as an
13 actual wav form. So as you play the file, you can actually
14 look at it graphically and see where the loud spots are, the
15 quiet spots are, where any noise might be, where specific
16 events happened. As you learn to do more and more audio
17 engineering, you get better and more adept at reading the wav
18 forms.

19 Q. So am I right in assuming that when you're listening
20 to this as you're working on a digital recording, you're also
21 watching it on the computer?

22 A. That is correct.

23 Q. In terms of enhancing a digital recording you have
24 put it in your computer, the actual CD, you have brought it up
25 on your computer screen, what type of computer program do you

1 usually use?

2 A. I have used a number of different programs, but the
3 ones that I usually are Adobe Audition, Wav Editing and Sound
4 Forge.

5 Q. And how long have you been using that particular
6 type of software?

7 A. Several years, more than five.

8 Q. And you're comfortable with that software?

9 A. Very comfortable.

10 Q. What's the process that you use to enhance a digital
11 recording using that software on your computer?

12 A. Like I said before, basically the first thing you
13 want to do is analyze it to see what you might want to remove
14 or enhance, and so forth and so on. So you do that using the
15 sound coming out of the monitors or the head phones that
16 you're listening to, and you can also use the visual that's on
17 the screen. There are three basic functions that get used
18 nearly all the time, and those are adaptive filtering. And
19 what adaptive filtering is is basically the program writes an
20 algorithm to remove noise.

21 Basically what you do is you look at the wav form
22 and you can actually take a look at a spot of the wav form
23 that includes no event data, so basically a silent part. But
24 in audio nothing is ever silent, there's always background
25 noise that's on the tape. You can basically use that noise

1 and have the computer write an algorithm to remove that
2 background noise from the entire wav form.

3 The other two functions that I use are dynamics
4 processing and normalizing. What dynamics processing is is it
5 allows me to work with the wav form to make loud sounds
6 quieter and make quiet sounds louder so you can hear things
7 that are in the background of the recording. And normalizing
8 allows you to make the wav form as loud as it can be without
9 clipping, which is to say distorting. No digital wav form can
10 be above zero decibels, so normalizing makes the loudest point
11 of the recording be zero decibels, so it makes it as loud as
12 it possibly can be without any kind of distortion.

13 Q. And is there a third thing that you can do, or was
14 that it?

15 A. I think those were three.

16 Q. Okay. And then the end result is a recording that
17 is the same recording that you got, but what?

18 A. It's enhanced. Basically what's been done is we
19 have removed noise, we have made the file, improved
20 intelligibility in different areas and made it as loud as it
21 could possibly be without distorting.

22 Q. This process that you've described using this
23 computer and doing this sort of enhancement, how long have you
24 been doing this particular process?

25 A. Over five years.

1 assists Rocky Mountain states. This type of enhance
2 the private sector is very expensive, so the government
3 contract is basically set up so that law enforcement agencies
4 can send us stuff, different media, and we can work on it
5 without having to have them pay since we are government
6 funded.

7 Q. So what types of things in the two months you worked
8 for RMIN did you work on?

9 A. I worked on audio cases and and I worked on video
10 cases. All different varieties, all different medias, digital
11 video, regular video, digital audio, some analog audio, a
12 number of different cases.

13 Q. And at some point you worked on a 911 call that
14 involves this matter?

15 A. That is correct.

16 Q. Can you tell us, please, why you only worked at RMIN
17 for two months?

18 A. The simple answer is this case in particular left me
19 with the inability to sleep and I decided that --

20 MR. SCHWARTZ: Objection, Your Honor, relevance, move to
21 strike and admonish the jury not to consider that.

22 THE COURT: Sustained.

23 A. So I had some trouble with this case.

24 THE COURT: Hold on, we're going to wait for another
25 question, thank you.

1 Q. How many times do you think?

2 A. Too many to counts. Thousands, I would say.

3 Q. At some point were you working for an organization
4 called RMIN?

5 A. That is correct.

6 Q. Can you tell us when you were doing that?

7 A. That was approximately June of this year until the
8 middle of August.

9 Q. So for two months?

10 A. Two and a half months.

11 Q. Where were you working for this organization?

12 A. I was working in their Phoenix office.

13 Q. In Arizona?

14 A. In Arizona, that's correct.

15 Q. What were you doing for RMIN?

16 A. I was doing audio and video forensics.

17 Q. Can you just briefly describe what that means?

18 A. Certainly. Basically what I was doing is taking in
19 all matter of evidence from law enforcement in the Rocky
20 Mountain states and basically doing enhancements and analysis
21 in order to give law enforcement more information about any
22 kind of audio or video media that was relevant to one of their
23 cases.

24 Q. What is RMIN, who funds it?

25 A. RMIN is a government funded project that basically

1 Q. (By Mr. Verharen) After you worked on this
2 particular recording you decided not to work for RMIN anymore?

3 A. That's correct.

4 MR. SCHWARTZ: Objection, Your Honor, relevance.

5 THE COURT: I'll let that response stand.

6 Q. (By Mr. Verharen) When you're actually doing the
7 enhancement of a recording, I think you have already told us
8 it's generated on your computer; is that right?

9 A. That is correct.

10 Q. Can you actually print that off?

11 A. I certainly can.

12 Q. Of what you can see on your computer?

13 A. Windows allows you to take a screen shot of anything
14 that's running on your monitor so you can print a screen shot
15 which will give you an exact representation of what is on the
16 screen at that time.

17 Q. Can you put a time line on sounds that are happening
18 during the recording?

19 A. Anytime that you bring a recording into a wav editor
20 it takes the wav form, and at the very beginning it labels the
21 very beginning of the recording zero zero. As the tape plays
22 forward it creates a time line so you can label events as the
23 recording plays.

24 Q. What's a vocal cue?

25 A. A vocal cue could be something on the tape, for

1 example, that somebody is listening for. So something that
2 somebody says of some kind of relevance would be something
3 like vocal cue.

4 Q. What's a percussive incident?

5 A. Percussive incident would be something of an audio
6 event that happens that's very, very loud, that happens very,
7 very quickly, something like a hand clap, somebody hitting a
8 drum or a gunshot.

9 Q. Well, let's go to this particular case. At some
10 point did you get a 911 call or calls from the Kootenai County
11 Sheriff's department?

12 A. That's correct, I did.

13 Q. Can you tell us how that happened, please?

14 A. I received a call from Brad Maskell who was looking
15 for enhancement of a 911 call, and that got channeled through
16 RMIN and they approved a request for enhancement and analysis,
17 and then it got basically sent to RMIN.

18 Q. And you got it?

19 A. That's correct.

20 Q. What were your instructions from Sergeant Maskell in
21 terms of this 911 call?

22 A. My instructions were to -- I was sent, on one CD, I
23 was sent three files. The first file was the first 911 call
24 that was placed. The second file was -- the second two files,
25 the last two files were the second call made, it was split up

1 by the 911 facility. So the second and third file are
2 actually the entire second call. And basically what he was
3 looking for was for me to take a listen to the recording, and
4 specifically what he wanted was to see if I could identify any
5 gunshots that were heard on the tape, on the recording.

6 Q. And when they occurred?

7 A. That is correct.

8 Q. In preparing yourself for identifying these things,
9 did you listen to anything?

10 A. I did. In preparing for this what I did was I
11 listened to some studio recorded gunshots so I could make some
12 analysis of what types of sounds gunshots would be to make
13 some class characteristic assumptions about gunshots. That's
14 when I basically I got an audio CD. On there were several
15 samples of gunshots being fired. The CD was something that
16 people might use in video or a movie for sound effects, but
17 they were real gunshots shot on a sound stage. So I used
18 those basically to get an understanding of what a gunshot
19 would sound like and the different characteristics of a
20 gunshot.

21 A gunshot is, as I said before, actually I haven't
22 said it, a gunshot is consistent with a percussive incident,
23 something that happens very, very quickly, all of the energy
24 of the sound happens nearly immediately so you will hear an
25 event happen, and it will be loud and quick. And then the

1 only thing that you might hear after that is the sound
2 bouncing back from any environmental actions, walls, trees,
3 something of that nature.

4 Q. So in terms of your enhancement of the two 911
5 calls, did you focus on the first one at all, enhancing the
6 first one?

7 A. I did not enhance the first call. I also did not
8 enhance the first file of the second call. Brad was looking,
9 Detective Maskell was looking specifically at the third call.
10 However, I did listen to both the first call and the first
11 file of the second call. I listened to all of the files that
12 were presented to me.

13 Q. And just to be clear, there's not three calls, three
14 911 calls?

15 A. Two calls.

16 Q. There's two 911 calls. The second 911 call has two
17 files inside it?

18 A. That is correct.

19 Q. And so you focused your action on the second half of
20 the second 911 call?

21 A. That is correct.

22 Q. In terms of listening to the first 911 call and the
23 first half of the second 911 call, what did you do?

24 A. Basically I listened through it critically trying to
25 determine if there was any sounds on there that would be

1 consistent with percussive incident.

2 Q. Were you able to locate any?

3 A. I was not.

4 Q. Let's turn our attention then to the second 911
5 call, the second half of it, and at some point you begin your
6 analysis of this?

7 A. That's correct.

8 Q. Can you describe for us the procedures you used?

9 A. Just like in any other work that I've done, I
10 started by making a copy of the file onto my computer and then
11 I loaded it into the wav editor that I was using, in this case
12 it was Adobe Audition 1.5., loaded it into the program and it
13 came up with a graphical display. Then I used the three
14 different types of functions that I explained before, adaptive
15 filtering, normalization and dynamic processing to basically
16 enhance the audio there.

17 Q. And following those procedures you were able to get
18 an enhanced copy of the second half of the second 911 call?

19 A. That is correct.

20 Q. When you were doing that, what you were doing was on
21 your computer screen?

22 A. That is correct.

23 Q. Q. Were you able to print and download a copy of
24 your computer screen as you were doing that?

25 A. I was.

1 Q. Let me show you what has been marked already as 144,
 2 I'll just hold it right here, what's Plaintiff's 144?
 3 A. It's basically an enlarged screen shot of the
 4 computer screen when I was working on this file.
 5 Q. It has a square section right here, what's that?
 6 A. Basically the square section is what's called a cue
 7 list. And what I did in the wav file is I actually identified
 8 several sections of the file that I felt were important. I
 9 labeled a section that I called crashing, and then I labeled
 10 five sections as percussive incidents. They're labeled in the
 11 cue list as percussive 1, 2, 3, 4 and 5. In the cue list is
 12 also a beginning time for the cue and an end time for the
 13 cue. So it basically tells you when the cue starts and when
 14 the cue ends. And within the cue is the audio incident that
 15 is important for some reason.
 16 Q. So basically what you have here is your wav form of
 17 the sounds from the second half of the second 911 tape, right?
 18 A. That is correct.
 19 Q. In those wav sounds you have identified a part there
 20 where you termed it vocal cue?
 21 A. That is correct.
 22 Q. And you pointed to a part in the wav sound where
 23 that is?
 24 A. The vocal cue has a time stamp next to it which is
 25 labeled as one minute 32 seconds point 350 indicating that the

1 A. That is correct.
 2 Q. And that's all represented here on Plaintiff's 144?
 3 A. Yes.
 4 Q. And that's what you added to essentially what was
 5 your computer screen in front of you when you were doing this
 6 process?
 7 A. That's correct.
 8 Q. Is this an accurate diagram?
 9 A. Yes, it is.
 10 Q. Would it help you in your testimony?
 11 A. Yes, it will.
 12 MR. VERHAREN: Move to admit 144.
 13 THE COURT: Any additional objections, Mr. Schwartz,
 14 other than those noted?
 15 MR. SCHWARTZ: Yes, Your Honor, may I approach?
 16 THE COURT: That would be fine.
 17 (Mr. Verharen and Mr. Schwartz at bench conference)
 18 THE COURT: Counsel, I think basically at this point I
 19 don't know that I'll admit the exhibit, but I'll certainly
 20 allow the exhibit to be used to assist the witness in his
 21 testimony. So if you want to go ahead and proceed in that
 22 direction right now.
 23 Q. (By Mr. Verharen) Mr. Hartmann, you have that
 24 laser pointer handy with you that you have been using?
 25 A. I do.

1 vocal cue starts at approximately one minute 32.350 into the
 2 recording. Again the computer arbitrarily starts the
 3 beginning of the recording at zero zero.
 4 Q. And then you can see the time for that vocal cur of
 5 132 down there at the bottom?
 6 A. That is correct.
 7 Q. And then following that you have got the various
 8 descriptive terms there as well as arrows pointing to where
 9 they happened in the wav sounds?
 10 A. That's correct.
 11 Q. What are those based on?
 12 A. I started with the first one is entitled crashing
 13 incident.
 14 Q. Just give me a general, I'm going to go through this
 15 again here in a minute, just give me a general idea what they
 16 show?
 17 A. Basically what they're pointing to is they're
 18 pointing to the cues that have been overlaid on the wav file
 19 indicating where in the time line the incidents can be found.
 20 Q. And basically here what you were looking at were
 21 some percussive incidences?
 22 A. That's correct.
 23 Q. As well as a crashing incident?
 24 A. That's correct.
 25 Q. And a vocal cue?

1 Q. Can you, using your laser pointer, show what you
 2 have on your computer screen?
 3 A. I certainly can. In the center here is the actual
 4 display of the wav form. This is the entire form of the third
 5 file which is the second half of the second call. Down at the
 6 bottom is where the time stamp is. If you notice, there is a
 7 little green arrow here and a little green arrow here, that
 8 indicates the play head, which basically works as a digital
 9 representation of a play head you would find on a cassette
 10 player. It's at the beginning of the recording right now,
 11 that's why the time stamp says zero zero. When I recorded the
 12 screen shot of my computer screen, the play head was at the
 13 beginning of the recording. Here is the cue list square, and
 14 inside the cue list are the cues that I marked out, crashing
 15 and percussive 1 through 5 with their beginning times and
 16 their end times and their length. I also replicated those on
 17 the right-hand side so they would be bigger and easier to
 18 read. Here I have the vocal cue listed with the time, the
 19 approximate in which it happens, one minute 32.350. And then
 20 I have the crash incident and the percussive incidents 1
 21 through 5 listed. I have arrows pointed from these notations
 22 to the wave form. You can actually, if you get close enough,
 23 see the actual beginning and ends of the cue lists, they're
 24 marked as dotted lines.
 25 Q. So in terms of the vocal cue where you begin your

1 analysis, what did you use?

2 A. Basically Detective Maskell asked me to specifically
3 locate the line: Oh, my God, he's turning around. Which
4 happened beginning approximately 1.32 seconds, which would be
5 right about in here, at the bottom here it has slash marks
6 every 10 seconds. So it would at approximately 1.32 which
7 would be approximately there.

8 Q. And just so we are on the same, so we have the same
9 understanding. The start of this thing, that's the start of
10 the second half of the second 911 call?

11 A. That's correct.

12 Q. And what you have here the vocal cue at 132 you can
13 see the time down here?

14 A. That is correct.

15 Q. And that's where you began your description here of
16 what you could hear and the times that you could hear it?

17 A. That's correct.

18 Q. In terms of your descriptions here, can you first of
19 all describe how you came up with the term crashing incident?

20 A. The crashing incident, which is worked as a cue as
21 145.4 to 147.076 is a loud incident that is a longer crashing
22 sound, it sounds like objects crashing together for an
23 extended period of time.

24 Q. And that went on from what time to what time?

25 A. Approximately 145.4 to 147.076.

1 Q. So for about two second?

2 A. That's correct.

3 Q. And that came after the vocal cue: Oh, my God, he's
4 turning around?

5 A. That's correct.

6 Q. About how long did the crashing incident come after
7 the vocal cue, Oh, my God, he's turning round?

8 A. Approximately 13 seconds. The vocal cue came at 1
9 minute 32, the crashing incident at 1 minute 45.

10 Q. And then following the crashing incident at 147 you
11 have your first percussive incident, is that right?

12 A. That is correct.

13 Q. And then you have labeled five other events there as
14 percussive incidents?

15 A. That is correct.

16 Q. How did come up with that?

17 A. The percussive incident, basically like I said
18 before, when I listened to the gunshots on the reference CD,
19 all of the gunshots had similar characteristics and they had
20 all of the energy of the sound in the beginning of the wav
21 resulting in a very percussive, quick attack.

22 Q. So these things that you have labeled as percussive
23 incidences, are they consistent with the sounds of gunshots
24 that you got yourself acquainted with?

25 A. They are.

1 Q. The first percussive incident is at what time?

2 A. First percussive incidence is at 1 minute 51 seconds
3 point 442. And the cue lasts until 1 minute 52 seconds point
4 533.

5 Q. All these percussive incidences are very fast?

6 A. They are. The cue lines that I marked out I marked
7 to basically encompass the sound. They are not exact, so in
8 other words the sound does not exactly take this length of
9 time, but it starts approximately at 1 minute 51 and ends at
10 approximately 1 minute 52. But within that time frame there
11 is a percussive incidence that happens very, very quickly.

12 Q. And the first percussive incident occurred how long
13 after the crashing incident?

14 A. Approximately, looks like about 4 seconds,
15 about 4.3.

16 Q. When is the time that the second percussive incident
17 occurred?

18 A. Second percussive incident is 2 minutes 13 seconds,
19 approximately, to 2 minutes 13 seconds about half a second
20 later.

21 Q. So about how long was the second sound that's
22 consistent with the sound of a gunshot from the first sound
23 that was consistent with the sound of a gunshot?

24 MR. SCHWARTZ: Your Honor, I object to leading and to the
25 characterization, let the witness testify as to what it sounds

1 like.

2 THE COURT: I would sustain.

3 Q. (By Mr. Verharen) How long was the second
4 percussive incident from the first percussive incident?

5 A. It appears to be approximately 21 seconds.

6 Q. How about the third one, when did that occur?

7 A. The third one happened approximately 14 seconds
8 after the second one.

9 Q. And then the fourth one?

10 A. The fourth one happened approximately 7 seconds
11 after the third one. And the fifth one happened nearly
12 immediately after the fourth one.

13 Q. Basically back to back?

14 A. That is correct.

15 Q. The last two?

16 A. Yes.

17 Q. As a result of your enhancement did you generate
18 another recording?

19 A. Yes, I did.

20 Q. Can you describe that for us, please?

21 A. Certainly. I took the cues that I marked out for
22 each of these incidents and actually copy and pasted the
23 information in between the cues onto a second file so that
24 these incidents if needed could be listened to separate from
25 the enhanced audio.

1 Q. Just by themselves?

2 A. That is correct.

3 Q. Did you generate anything in terms of a actual CD
4 recording, I know we are looking at the process there in
5 Plaintiff's 144, but did you generate an actual CD recording
6 as a result of your process?

7 A. Yes, I did. The CD itself has two files on it. The
8 first file is the entire way form which keeps the time line
9 intact. The second is the individual incidents, six of them
10 including the crashing incident and they are each separated by
11 one second of silence on its own file.

12 Q. About how long is the enhanced 911 call, which is
13 the second half of the second call?

14 A. It's just over four minutes.

15 Q. Nd about how long is this separate part where you
16 have set aside the crashing incident and the five percussive
17 incidences?

18 A. Obviously the incidents themselves are only a few
19 seconds each and they are separated by a second of silence
20 each, so probably five or six seconds long.

21 Q. We just looked at that a moment ago, I think it's
22 marked as Plaintiff's exhibit number --

23 THE COURT: Before we get to that I think we'll break for
24 the lunch hour. I don't think we'll get through Mr.
25 Hartmann's testimony by lunch, so we'll go ahead and break at

1 you left your prior employment and you responded because it
2 was of the nature of this case in particular?

3 A. Yes.

4 Q. Prior to testifying today did you speak with
5 Mr. Verharen about what your testimony was going on?

6 A. Yes.

7 Q. Did he ask you about why you left your prior
8 employment?

9 A. Yes.

10 Q. What did you tell him?

11 A. In as many words the same thing as I said here,
12 which was the nature of this particular case.

13 MR. SCHWARTZ: That's all the questions I have, Judge.

14 THE COURT: Did you wish to ask any questions,
15 Mr. Verharen?

16 MR. VERHAREN: No, Judge.

17 MR. SCHWARTZ: We will be moving for mistrial based on
18 response this witness gave to that question, because this
19 indicates that it was so awful that he had to quit his former
20 job. Testimony he just gave us shows in support of this
21 motion that that information was given to the prosecutor
22 beforehand and the prosecutor intentionally asked him that
23 question so that he would give that response to the jury,
24 certainly attempt to inflame the jury, highly prejudicial and
25 deprives Mr. Ellington of his due process rights.

1 this time, sir, and thank you very much, you can step down.
2 We're going to get back under way at 1:15 with your testimony,
3 so we'll see you back here at that time.

4 Members of the jury, again I will admonish you not
5 to discuss the case among yourselves, nor form or express an
6 opinion about it until it is finally submitted to you. We
7 will be in recess until 1:15 and we'll come back and be under
8 way again until 3:30 this afternoon. Thank you very much,
9 we'll stand adjourned.

10 (Lunch recess)

11 MARCH 25, 2006, 1:15 O'CLOCK P.M.

12 (WITHOUT THE JURY PRESENT)

13 THE COURT: I believe we are ready to get under way.

14 MR. SCHWARTZ: We have a motion we talked about at side
15 bar.

16 THE COURT: We can take that up. Parties in place,
17 counsel are here, I have been advised our jury is back from
18 lunch. Go ahead, Mr. Schwartz.

19 MR. SCHWARTZ: We are asking for another motion of
20 mistrial. May I briefly inquire of the witness in support of
21 that motion?

22 THE COURT: Go ahead.

23 VOIR DIRE EXAMINATION

24 BY MR. SCHWARTZ:

25 Q. Earlier Mr. Verharen asked you a question about why

1 Additionally amounts to prosecutorial misconduct by
2 intentionally, with knowledge beforehand. Asking this witness
3 to get that kind of information out in front of the jury.
4 Clearly irrelevant in this case and simply designed to remind
5 this jury how awful this case is and affected this witness's
6 life so profoundly by the sheer nature of it. Highly
7 inappropriate and specifically sought after by the state.

8 On that grounds alone, Judge, I would think that
9 amounts to a mistrial. That problem is compounded now that
10 this is the third time the state elicited information from a
11 witness clearly inappropriate in the trial. We first have the
12 discussion of the attempts to interview Mr. Ellington and the
13 comment on his silence. And then we have the discussion about
14 that he is represented by the public defender's office. And
15 now we have the state specifically, this is the most clearly
16 intentional that we have had yet, Judge, by the fact that this
17 witness has just testified that Mr. Verharen knew what that
18 response was going to be before he even testified today.
19 Mr. Verharen specifically asked him that question in order
20 to inflame the jury.

21 So I think that the cumulative error doctrine is
22 specifically on point in this case, Your Honor. Now we have
23 all of these different errors all caused by the state, and
24 this one with the state's specific knowledge of what that
25 answer was going to be, but the state still sought that

1 answer.

2 So given those reasons, Judge, we would ask for a
3 mistrial in this case.

4 THE COURT: Thank you, Mr. Schwartz.

5 Mr. Verharen.

6 MR. VERHAREN: Mr. Schwartz' is right, I did know what
7 the witness's answer was going to be and I did intentionally
8 ask that question knowing what the answer was going to be.
9 But the reason I asked the question wasn't because of what
10 Mr. Schwartz has suggested. It was because I figured, and
11 it's proven to be true, that his testimony was going to be
12 highly contested, that every effort was going to be made to
13 not have this witness testify and/or to impeach him when he
14 testified.

15 So having him work at this facility for only two
16 months I thought may create some sort of an issue, and I
17 thought it needed to be clear in front of the jury the reasons
18 behind him leaving after only being there for two months.
19 That's why I elicited that information and for that purpose
20 only.

21 I don't believe this amounts to prosecutorial
22 misconduct nor do I think the court is required in any shape
23 or fashion to declare a mistrial at this point.

24 THE COURT: Go ahead, Mr. Schwartz.

25 MR. SCHWARTZ: Judge, assuming that information to be

1 true, that would be a different situation had we
2 cross-examined this witness and made an issue out of why he
3 quit, then maybe that could be in order to rehabilitate that
4 Mr. Verharen could have brought that up. This was brought up
5 in the state's case in chief with no prompting from anyone.
6 And it's clearly designed to inflame the jury. The prosecutor
7 could have had him say the job didn't suit my needs anymore or
8 something like that. But there was no reason to have him say
9 that this case in particular was so awful that it made him
10 quit his job.

11 There is no reason for that testimony to be entered
12 except to inflame the jury, especially given that it's in the
13 state's case in chief. It isn't even offered in rebuttal or
14 in order to rehabilitate a witness. It's
15 offered in the state's case in chief, and that clearly is
16 prosecutorial misconduct and has once again infringed on
17 Mr. Ellington's due process rights under the cumulative error
18 doctrine.

19 It's just another straw that when you take one dowel
20 you might be able to crack, but when you combine all these
21 dowels together it's too much error and Mr. Ellington can no
22 longer get a fair trial.

23 Thank you, Judge.

24 THE COURT: Thank you, Mr. Schwartz.

25 I certainly can appreciate the fact that

1 Mr. Hartmann, having only worked at a job for a short period
2 of time, might raise some type of a question. It wouldn't be
3 the first time that perhaps the opposing side would bring that
4 to issue that maybe he has got some competency problems and
5 that's why he only worked at a location for a couple of
6 months. Of course there could be lots of reason why somebody
7 was working at a job only on a limited basis, could be a
8 consultant, part-time employee. I could go on ad nauseam to
9 the reasons behind that.

10 It would seem to be the more prudent avenue if the
11 state was concerned about that was let the defense inquire
12 into that, which would have been certainly at their own risk
13 under the circumstances of this case. If there were other
14 reasons that weren't relevant, say he had some poor
15 performance records, and I'm sure the state would have
16 objected and we could have gotten into that. So I think it
17 was unnecessarily elicited here from the witness.

18 One thing that I probably should point out, first of
19 all, when dealing with a mistrial, again must be a legal
20 defect in the proceedings. I'm not satisfied that what has
21 occurred here amounts to prosecutorial misconduct. And I'm
22 not sure that we have reached either under the cumulative
23 error doctrine or otherwise independently a basis to declare a
24 mistrial at this point in time.

25 But I do one thing to me is abundantly clear, and

1 that is that this case certainly has some very disturbing
2 circumstances attendant to it. These two young girls lost
3 their mother in a very violent fashion, regardless of what
4 accountability may ultimately lay in terms of Ms. Larsen's
5 demise.

6 This case is unusual because we happen to have a
7 audio recording of the incident. The very moment that
8 Ms. Larsen was run over by this vehicle was recorded on tape
9 and the hysterical responses of the two Larsen girls, the
10 sound of the crashing vehicles, the pandemonium that reigned
11 afterwards, this is all reflected on these tapes.

12 I've been doing this work as a judge for over 20
13 years now, and as a defense attorney and a prosecutor before
14 that and I've handled a number of cases, and I think there's
15 certain aspects of this case that are particularly gruesome in
16 terms of some of the photographs and exhibits we have already
17 looked at. Particularly disturbing in terms of particularly
18 this 911 tape. And above and beyond most of the cases that
19 I've dealt with, this one certainly has an element that is
20 certainly disturbing regardless again of any particular
21 accountability that may ultimately be laid in this case.

22 What concerns the court here is that the issue, the
23 legal issue, as I understand it, is not that Mr. Ellington is
24 claiming that he wasn't there, that somebody else was involved
25 in this activity, but that he was in fact there and that the

1 mental state is really the question that's going to ultimately
2 be derived as to whether or not this incident occurred based
3 on criminal responsibility on his part in terms of what he
4 intended to do or what he may have recklessly caused to
5 happen, or what he simply was a player in that accidentally
6 occurred. I think that's the ultimate issue that is going to
7 transpire in that case.

8 I think that's what we need to focus on in terms of
9 determining whether the state is able to prove their burden as
10 to whether or not Mr. Ellington is guilty or not guilty of the
11 particular offense charged.

12 I know that the state has made considerable efforts
13 to admit photographs that I felt were relatively gruesome, and
14 I still am at a loss as to understand why they were as
15 probative as they might otherwise need to be in some cases
16 where there are some otherwise contested issues on some of
17 these points, but the state has attempted to do that on a
18 number of occasions.

19 I know we had a photograph of the family that
20 Miss Taylor didn't object. I don't know that that's relevant.
21 Certainly bringing out Mr. Hartmann's disturbing reflection on
22 this case, which I find to be totally normal even in my line
23 of work, I think simply doesn't have a place in this case.
24 This case needs to be tried on the facts, the circumstances
25 that took place, and it shouldn't be tried and determined

1 based upon some type of emotional loss that these young girls
2 and their father have experienced upon the gravity of the
3 circumstance that took place and the emotions that were
4 involved, it should be determined on the facts and the law
5 that ultimately will be applicable to this case.

6 And while I agree at this point with the state that
7 Mr. Ellington is in a position that he still can proceed to
8 have a fair trial, I would have to note for the record that
9 I'm starting to become a little bit concerned because I think
10 that the state needs to focus not on issues that would bear
11 upon the prejudice of the jury but upon the facts of this
12 particular case, because we have to determine whether or not
13 Mr. Ellington's intent, if any, is unlawful or was simply the
14 victim of some circumstances that have resulted in this
15 horrific event.

16 And I think that can be done without focusing on
17 some of these emotional issues and some of these other graphic
18 details that I think are otherwise simply inescapable. I
19 think the jury obviously has to hear some of these things. We
20 simply can't get around them. Unfortunately we're going to
21 listen to this 911 call again most likely, and these things
22 need to rest on their own accord and need not be overly
23 emphasized so that the jury doesn't decide this case on an
24 inappropriate basis.

25 So I will deny the motion, Mr. Schwartz, I'll

1 certainly note it and hopefully my comments will be recognized
2 here.

3 Anything further on this point?

4 MR. VERHAREN: Yes, sir.

5 THE COURT: Go ahead.

6 MR. VERHAREN: Judge, I have to prove a number of
7 elements to prove murder, and that requires me to prove that
8 at a certain place on a certain date Mrs. Larsen was killed,
9 and there are some other elements that we're all familiar
10 with. That requires me to produce evidence of how she died,
11 when she died and where she died. It seems to me there is a
12 great body of case law in the state of Idaho, as there is
13 elsewhere in this country, that states to the effect that
14 although gruesome photographs in a homicide may be
15 prejudicial, oftentimes there is probative value.

16 And it seems to me to be a very rare murder case
17 where the court will not allow a photograph of the victim
18 where she died, and that's what's happened in this case.

19 There are a couple of different experts that the
20 defense intends to call in their case in chief that are going
21 to attempt to put the location where Mrs. Larsen was struck in
22 a different location, which is very important to this case.
23 They're going to try to put her closer to the Honda.

24 The state's case here is based on where Mrs. Vonette
25 Larsen was struck and killed. A number of these photographs,

1 besides showing how Mrs. Larsen died and where she died, also
2 show the location of some other important evidence such as her
3 hair, such as a blood smear and such as tire marks. These
4 things are important to disproving the defense experts.

5 I am not trying to arouse the passions of the jury
6 here. I am simply trying to prove my case. There is no
7 stipulation here from the defense as to any of my elements and
8 I'm required to prove up those elements. In a murder case
9 photographs of the victim, how that victim died and where they
10 died typically come in. It's a rare situation indeed where
11 they wouldn't. I am not trying to do that, Judge. I am
12 simply trying to prove any case.

13 THE COURT: I appreciate those comments, Mr. Verharen,
14 but again I think the defense has stipulated that Miss Larsen
15 has died in their opening statement. There has been no
16 dispute that she has died. There has been no dispute that she
17 has died as a consequence of Mr. Ellington's vehicle running
18 over her. Now I realize that there may certainly be a dispute
19 presented to this court as to the exact location that this
20 collision took place. And I certainly appreciate that the
21 position of Miss Larsen's body may be probative, and I know
22 all of those photographs were probative, perhaps, to the
23 position her body was in at the time of the incident.

24 The question always has been whether or not the
25 probative value is outweighed by the prejudicial effect of

1 that exhibit. Especially in light of the fact that if we need
2 to establish a location of a body, things such as marks on her
3 face, marks on her hip, the direction of those marks, marks on
4 the pavement, hair on the pavement, blood on the pavement, all
5 of these things which I think can come in and have come in
6 through Sergeant Maskell's testimony, that certainly in my
7 mind would be the probative approach to admitting the evidence
8 without being unduly prejudicial to the issues at hand.

9 I have already noted earlier that should the state
10 raise issues that leave you in a position that there is no way
11 you can prove these facts other than the reintroduction of
12 these photographs, that that becomes a different story, and I
13 wholeheartedly agree.

14 I simply wanted to make it clear on the record here
15 that this particular case has some very graphic details in
16 front of it, the tape particularly, the photographs
17 specifically, that to me exceed what I normally see in a
18 murder case that I've been experienced with. And I think we
19 have to proceed cautiously. If those issues need to be
20 paraded in front of the jury to prove critical facts that
21 cannot be proved any other way, then I would wholeheartedly
22 agree with the state that they should be able to do that.

23 Up to this juncture I'm not satisfied that that
24 needs to occur. That certainly may change as this case
25 progresses and I have left the door open for that purpose. I

1 A. Yes.

2 Q. And this is the exhibit that you produced after you
3 did the enhancement that's represented in 144?

4 A. That is correct.

5 Q. And the particular exhibit 152, that's an accurate
6 copy of the original CD that you produced of the second half
7 of the second 911 call; is that right?

8 A. That's correct.

9 MR. VERHAREN: Move to admit 152.

10 THE COURT: Other than the objections we have already
11 discussed, Mr. Schwartz, do you have any further objection?

12 MR. SCHWARTZ: Your Honor, separate from those objections
13 I still have continuing objections to the second part of that,
14 and it's being offered as only one exhibit, the second one
15 created where he has actually taken the sounds out. I think
16 there are further objections that would need to be discussed
17 outside the presence of the jury. If he's just moving to
18 admit the original tape, notwithstanding the original
19 objections then.

20 MR. VERHAREN: I'm moving to admit 152.

21 THE COURT: Does that have all of the sequences that he
22 has testified to in it?

23 MR. VERHAREN: Yes, sir, maybe I'll lay a little more
24 foundation.

25 THE COURT: That's fine, thank you.

1 appreciate your comments on that, and I have ruled on the
2 motion, I have denied the motion, and I will certainly keep
3 that in mind as counsel, I hope, will keep my comments in
4 mind.

5 Anything further?

6 MR. VERHAREN: No, Judge.

7 THE COURT: Thank you. Anything else, Mr. Schwartz?

8 MR. SCHWARTZ: No, thank you.

9 THE COURT: And let's bring our jury in.

10 (Concludes without the jury present)

11 (JURY IS PRESENT)

12 THE COURT: The record should reflect that our jury is
13 all present. We are ready to get under way.

14 Mr. Verharen, anytime you're ready, you can go ahead
15 and continue your examination of Mr. Hartmann.

16 MR. VERHAREN: Thank you, Judge.

17 ERIC HARTMANN

18 DIRECT EXAMINATION (cont'd)

19 BY MR. VERHAREN:

20 Q. Mr. Hartmann, I think you were in the middle of
21 taking a look at 152. That actually is the audio recording,
22 the CD that you made?

23 A. That's correct.

24 Q. In terms of that particular exhibit, if I recall
25 right you had already talked about how long it was?

1 Q. (By Mr. Verharen) In terms of what's on
2 Plaintiff's 152, can you tell us again what's reflected on
3 that particular recording?

4 A. Certainly. The first track is the wav file, the
5 audio recording of the entire incident, all four plus minutes
6 of it. The second file is the actual incidents, the crashing
7 incident and the percussive incidents 1 through 5 just placed
8 in a separate file so they can be listened to or looked at
9 separately. They're the same pieces of data. All I did was
10 copy and paste from the cue marks. On the second file, which
11 you would hear subsequent to the first one, the crashing
12 incident has just been pulled out from the extra data.

13 Q. As well as the five percussive incidents?

14 A. That is correct, and they're all separated by one
15 second of silence.

16 MR. VERHAREN: Move to admit 152.

17 MR. SCHWARTZ: Your Honor, I would object to that second
18 part where he's taking the sounds out, I would object on
19 several grounds. First I would say it's cumulative. Now with
20 the introduction of the enhanced tape, we'll have two
21 different copies of this 911 tape that these sounds are part
22 of.

23 Secondly, Your Honor, they're taken out of context
24 then. If you take those sounds out, then they're simply just
25 blurps of sound. This witness has already testified he can't

1 be specific about what sounds are what. Now at that point
2 they're just out of context sounds, and he has already
3 testified that the holistic examination of it is what is
4 crucial to distinguishing the different sounds.

5 Separately, Your Honor, I would note that by taking
6 them out of context, there's no description of them, they're
7 just six different sounds. I don't think there's been enough
8 foundation laid. I don't think that his expertise that's been
9 established would be able to justify those, and I don't think
10 it's particularly useful, Judge. If they can listen to the
11 enhanced tape, there's no reason to listen to the six sounds
12 on their own.

13 THE COURT: Anything further, Mr. Verharen?

14 MR. VERHAREN: No, Judge.

15 THE COURT: I'll certainly note the objection here. I
16 think there is enough foundation that has been laid here.
17 What's the duration of the entire exhibit in terms of time
18 again?

19 WITNESS MR. HARTMANN: Of the second one?

20 THE COURT: The whole thing that you're about ready to?

21 WITNESS MR. HARTMANN: The whole one is just over four
22 minutes, about four minutes and 10 seconds.

23 THE COURT: Including the separated incidences?

24 WITNESS MR. HARTMANN: With the separated incidences, the
25 separated incidences are maybe another, at most, 10 seconds,

1 so it would be an additional 10 seconds to the four minutes
2 and 10 seconds.

3 THE COURT: I'll overrule, I'll allow the exhibit to be
4 admitted.

5 MR. VERHAREN: I'm going to move to publish the exhibit
6 at this time.

7 THE COURT: That would be fine. Do you have means to do
8 that, Mr. Verharen?

9 MR. VERHAREN: I do.

10 (Plaintiff's exhibit 152 played at this time.)

11 MR. VERHAREN: No further questions.

12 THE COURT: Thank you, Mr. Verharen. Mr. Schwartz, do
13 you have some questions for Mr. Hartmann?

14 MR. SCHWARTZ: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. SCHWARTZ:

17 Q. Good afternoon, sir.

18 A. Good afternoon.

19 Q. I want to start by talking about some of your
20 education and experience.

21 A. Certainly.

22 Q. So you said that you had a bachelors degree?

23 A. That is correct.

24 Q. What is your bachelors degree in?

25 A. I have a bachelor of applied science in visual arts.

1 Q. Do you have any degrees in audio enhancement or
2 audio engineering?

3 A. No, I do not, but I have taken university level
4 classes in audio recording and mastering.

5 Q. I see from your cv here that you are a adjunct
6 professor at Mesa Community College?

7 Q. Actually that is incorrect due to a clerical error,
8 two people were hired for the same position. I decided since
9 I'm now working a full-time job in addition to my part-time
10 work that it would be easier for me to not take the class.

11 Q. In theory if you would have been a professor there,
12 it indicates that you were going to be a professor of the
13 ascetic principals and graphic design fundamentals?

14 A. That is correct.

15 Q. Does that have anything to do with sound
16 engineering?

17 A. Well, no.

18 Q. How many times have you testified in a criminal
19 trial as an expert?

20 A. This will be my first.

21 Q. Into the process that you used in this case, the
22 majority of the work that's done in this sort of situation
23 that you have described is done by computers, correct?

24 A. It's done with computers using computers, yes.

25 Q. And what program do you use to obtain this?

1 A. This particular program is Adobe Audition 1.5.

2 Q. And are there other programs that can be used in
3 this fashion?

4 A. Yes, there are.

5 Q. Like what?

6 A. Sound Forge. There is Sonar. You could use
7 Audacity, there are a number of different programs.

8 Q. Why do you use your program above any of those
9 others?

10 A. This particular program was the program furnished to
11 me by RMIN.

12 Q. So it was given to you by this police investigation
13 entity?

14 A. Yes. It was the one that was given to me by my
15 employer at the time, that's correct.

16 Q. And we will talk about that briefly. Describe this
17 organization for me?

18 A. RMIN is the Rocky Mountain Information Network. They
19 supply a variety of different services to law enforcement
20 agencies in the Rocky Mountain area. It's a government funded
21 program.

22 Q. So in essence you work for a law enforcement agency?

23 A. Yes.

24 Q. And all of the work that you do is solely for law
25 enforcement agencies?

1 A. Yes, that is correct.

2 Q. In this case how did you first get introduced to
3 this case?

4 A. I received a phone call from Detective Maskell, and
5 then I believe after that he filled out a request letter that
6 was sent to my supervisor at RMIN. It was approved and we got
7 the case.

8 MR. SCHWARTZ: May I approach the witness, Your Honor?

9 THE COURT: That would be fine.

10 Q. (By Mr. Schwartz) Sir, I'm going to hand you what
11 is marked Defendant's exhibit F, could you please review that
12 for me?

13 A. Certainly can. (Witness looking at exhibit F)

14 Okay.

15 Q. Do you recognize that letter?

16 A. I certainly do.

17 Q. What is it?

18 A. It is a letter to Wayne Drew, the intelligent
19 services matter, requesting investigation analysis of the
20 audio evidence for this case.

21 Q. And that is the basis then of how you got involved
22 in this case?

23 A. That is correct.

24 Q. Does that letter indicate what the police are
25 looking for from you?

1 Q. And there was very specific areas that they told to
2 you look for it?

3 A. That's correct.

4 Q. That's what resulted in this investigation?

5 A. Yes.

6 Q. Now, when you are first preparing this enhancement,
7 you go through and you listen to the entire tape?

8 A. That is correct.

9 Q. And then you're looking for what the police have
10 told you to look for which is percussive incidents?

11 A. The first thing that I do is I listen to the entire
12 recording to make sure there are no problems with it, no
13 errors. Sometimes there are digital areas, problems with the
14 media, so forth and so on. So I listen through the whole
15 thing to determine that it's a good file, that there's no
16 problems with it. In doing so I do listen to all of the
17 information there critically to make sure, like I said, that
18 there are no errors and to see if there is anything of any
19 kind of interest. But once I was through listening to that,
20 yes, I did focus on this file, specifically looking for what
21 Detective Maskell had indicated in the letter.

22 Q. And so you use your judgment to determine what
23 difference enhancements you're going to try to use to get the
24 sound that the police have directed you to find?

25 A. That's correct.

1 A. It does.

2 Q. What does it say?

3 A. This tape has come into --

4 MR. VERHAREN: Objection to reading from an exhibit that
5 hasn't been admitted yet.

6 THE COURT: Sustained.

7 Q. (By Mr. Schwartz) Is it your understanding that
8 you became involved in this case because the police had very
9 specific things they wanted RMIN to look for?

10 A. Yes.

11 Q. And does that indicate what those reasons are?

12 A. Yes.

13 MR. SCHWARTZ: Your Honor, I'd move to admit Defendant's
14 exhibit F.

15 MR. VERHAREN: I just need to look at it, I don't know if
16 I have objection or not, I'm not sure which letter it is.

17 THE COURT: That's fine if you want to approach and take
18 a look at the exhibit, please.

19 MR. VERHAREN: No objection.

20 THE COURT: Thank you. Defendant's exhibit F will be
21 admitted.

22 Q. (By Mr. Schwartz) So when you became involved with
23 this case there were very specific things that the police told
24 to you look for?

25 A. Yes.

1 Q. And there are a phethora of enhancements that you
2 can try to use?

3 A. That's correct.

4 Q. But you used the ones that got you the best
5 information in regards to the information the police wanted
6 you to find?

7 A. Yes.

8 Q. So describe for me what a percussive incident is?

9 A. Percussive incident is an audio event when it
10 happens, all of the energy or most of the energy of the event
11 happens in the beginning of the audio event, it's something
12 that happens quickly and loudly. Not much information is
13 contained after the event actually happens with the exception
14 of the sound becoming reverberated or reflected back to the
15 microphone.

16 Q. So you're listening for quick, loud sounds?

17 A. That's correct.

18 Q. So what about the sound of two cars colliding with
19 each other?

20 A. Two cars colliding would give a longer sound. It
21 would give a sound that would give more time. It would not be
22 percussive enough. It would be loud, but two cars crashing
23 together would take longer than something that is consistent
24 with a percussive incident.

25 Q. And so you go through and you decide which ones of

1 the sounds you find too long to be a percussive incident?

2 A. Yes.

3 Q. So if there were maybe five other people who
4 listened to this, they might define what a percussive incident
5 is on this given tape differently than you have?

6 A. Five other people, possibly. Five other people who
7 have worked in audio extensively, I would think not, I would
8 think they would label the same incidents that I labeled.

9 Q. So on this exhibit that you have in front of you,
10 you have labeled this first one as a crashing incident?

11 A. That is correct.

12 Q. How long did you say that took?

13 A. I didn't say how long it took. I listed when the
14 cue start and ended. The cue starts at 1 minute 45.4, the cue
15 ends at 1 minute 47.76. The cue is a reference point to
16 indicate where the event happened. It does not the indicate
17 the length of event.

18 Any kind of sound event, anytime a sound is made,
19 sound never actually disappears, it just goes somewhere else.
20 It's sort of like a beam of light, if you shoot a beam of
21 light into space, it's still going forever. The problem is
22 at some point you can't hear it anymore. There is no accurate
23 way to determine when something goes to infinity because
24 infinity is infinity. So there is no accurate way to tell
25 when something starts and stops. So all the cues are, they're

1 the same pitch. A drum could give a percussive sound,

2 somebody hitting something with a hammer, a piece of metal
3 would also give a percussive sound.

4 Q. So two pieces of metal hitting each other could make
5 a percussive sound?

6 A. Yes.

7 Q. But a car crash couldn't?

8 A. No, a car is not one single piece of metal, a car is
9 many pieces of metal and glass. When two cars collide it
10 takes more time than a single hammer strike.

11 Q. What about a car crashing incident that involved a
12 prolonged exposure of contact, no contact, contact, no
13 contact? Could that create a percussive incident?

14 A. I would not generalize it as a percussive incident,
15 no. Anytime that two cars are going to crash at any kind of
16 reasonable speed, to give off that kind of volume it's going
17 to take longer. When I say a hammer hitting something, it's
18 something that happens very quickly. With cars there are
19 crumple areas and things get compressed. There is a longer
20 period where the two objects are in contact.

21 Q. And by that longer period, do you mean at the
22 outset .5 seconds?

23 A. The .5 seconds is an arbitrary number you picked.
24 Once again the cues are just reference points, they do not
25 indicate the actual lengths of the events.

1 just cues to tell you when the event happens.

2 Q. You have defined the parameters of what you're
3 calling the crashing incident as what you have there on the
4 diagram?

5 A. That's what I'm using for a reference point to
6 access it, yes.

7 Q. And how long, my math isn't very good, how long
8 would you say that crashing incident from the cue that you
9 arranged, how long do you have it listed on there as
10 occurring?

11 A. From the cue approximately 1 second .676.

12 Q. And then right below you have what you're describing
13 as the first percussive incident?

14 A. That is correct.

15 Q. And that is what?

16 A. That is just under one second, approximately
17 .9 seconds.

18 Q. So really what we're talking about is less an half a
19 second difference between what you're describing as a crashing
20 incident and a percussive incident?

21 A. Half a second different in the cues that I labeled,
22 not in the events themselves.

23 Q. What other sounds could be percussive incidents?

24 A. Any other sound that has the same general
25 characteristic, somebody hitting a drum tuned to approximately

1 Q. The sounds obviously have to be shorter than that
2 time you've laid out?

3 A. Like I said, sounds keep going, it's just a
4 reference.

5 Q. Okay.

6 A. Just a reference.

7 Q. Within that time frame that you have laid out, the
8 sound that's audible on this tape that you have enhanced
9 occurs within that time period? The audible portion that
10 you're enhancing occurs within that segment that you have
11 laid out?

12 A. More or less, yes.

13 Q. More or less, yes?

14 A. Yes, more or less, yes.

15 Q. Now as to the other percussive incidents, I
16 understood they all have different times?

17 A. That is correct.

18 Q. If they were the same percussive incident coming
19 from the same source, wouldn't they have similar time frames?

20 A. Similar, yes. But once again the cues are just
21 cues, they're not indicating the length of the gunshot. Also
22 along with that, anytime that you do something like a
23 percussive event like, let's say you're hitting a drum
24 repeatedly, every time you hit a drum it's going to sound
25 slightly different because the impact will be different,

1 environmental facts may have changed, the location of the
 2 recording device from the impact might be different. They
 3 will have similar characteristics, they will be consistent in
 4 those characteristics but they will never be identical.
 5 Q. I want to talk to you about microphones.
 6 Microphones work by taking in sound vibrations?
 7 A. That is correct.
 8 Q. At some point there gets to be too much vibrations
 9 for a microphone to accept the sound, what's that called?
 10 A. That's called clipping.
 11 Q. And what does that mean?
 12 A. Clipping basically means that you're going past the
 13 input level that the microphone can accept. Every microphone
 14 is different, has a different sound level that it can accept.
 15 Once you go past that, basically it distorts the signal.
 16 Q. And what was the clipping level of the microphone
 17 that recorded this sound?
 18 A. I do not know.
 19 Q. What was the model of microphone that recorded this
 20 sound?
 21 A. I do not know.
 22 MR. VERHAREN: Objection, asked and answered.
 23 THE COURT: I believe that's a different question,
 24 overruled.
 25 Q. (By Mr. Schwartz) Wouldn't knowing what kind of

1 A. It is possible that if the microphone was clipping
 2 at any given moment that there could be data behind it that I
 3 was not able to hear, that is correct.
 4 Q. So on this tape that you analyzed, the 911 tape,
 5 were there areas where the microphone was clipped?
 6 A. Yes, there were.
 7 Q. When?
 8 A. Off the top of my head I don't the specific times.
 9 Q. You didn't review your transcript to come up with
 10 the times?
 11 A. No.
 12 Q. Maybe I can come up with some examples. What about
 13 when the girl is screaming into the phone?
 14 A. Some of the time she is clipping and some of the
 15 time she is not.
 16 Q. When is she clipping and when isn't she?
 17 A. I don't know.
 18 Q. So you have been able to identify the six areas that
 19 the police told you to identify?
 20 A. Yes.
 21 Q. But beyond that you haven't detailed or remember any
 22 of the details from the tape?
 23 A. I remember plenty of the details from the tape. I
 24 don't specifically remember the exact second marks down to a
 25 third decimal point where the clipping occurred.

1 microphone it was be important to determining what level of
 2 sound that microphone could accept?
 3 A. It actually makes very little relevance. Sound
 4 pressure level is not -- people like to think that sound
 5 pressure level is the same thing as volume and it's not. I
 6 can overload this mike right here by stepping up into it and
 7 blowing hard. I can pretty much overload any microphone by
 8 doing that.
 9 Q. When you overload the microphone, what happens?
 10 A. Basically what happens is the actual diaphragm
 11 element moves further than it can physically move and it
 12 causes distortion. It basically clips the top of the wav. If
 13 I was to display it graphically, what would happen is the wav
 14 form would actually go above zero decibels and it would
 15 flatten the top of the wav out, thus clipping it.
 16 Q. What happens when there is distortion?
 17 A. It basically changes the sound of the wav form. And
 18 I'm not sure what else you're asking.
 19 Q. So a lot of what you did in this enhancement was
 20 take noises that are in the background and move them so that
 21 they're more audible to any of us listening?
 22 A. Yes, not necessarily in the background, but, yes,
 23 things that were harder to hear than others, yes.
 24 Q. And if the microphone was clipped at that point, you
 25 wouldn't be able to do that analysis, would you?

1 Q. So while that clipping was occurring, you weren't
 2 able to retrieve the sounds that are occurring in the
 3 background during that clipping period?
 4 A. During the periods that did clip, it is possible
 5 that sounds were underneath it. There is really at this point
 6 in technology no way to repair clipping because it's something
 7 that happens before the digital recording is made.
 8 Q. What percentage of this 911 call that you reviewed
 9 would you say was occurring during the microphone being
 10 clipped out?
 11 A. Possibly 1 or 2 percent.
 12 Q. So only 1 or 2 percent while she's screaming clipped
 13 out the microphone?
 14 A. I would say approximately, yes. But as I have said,
 15 I have not memorized the exact lengths and occurrences of the
 16 clipping.
 17 Q. Do you recall the sort of time frame of the tape,
 18 the 911 call?
 19 A. In terms of?
 20 Q. Of when things are happening?
 21 A. More or less, yes.
 22 Q. How long after the Blazer is gone from the
 23 description on that 911 tape do you say those last two
 24 percussive incidents occurred?
 25 MR. VERHAREN: Objection, lack of foundation.

1 MR. SCHWARTZ: Your Honor, he testified that he recalls
2 the events.
3 THE COURT: I'll overrule, you can answer.
4 MR. VERHAREN: I don't know how the witness can testify
5 after the Blazer is gone, Judge.
6 THE COURT: I understand the focus, I think maybe you
7 need to rephrase the question.
8 Q. (By Mr. Schwartz) On the 911 tape it becomes clear
9 at some point that she's not yelling as much as she was
10 before?
11 A. Yes.
12 Q. And she's no longer describing what's occurring in
13 relation to the Blazer?
14 A. As I was not there I'm not necessarily sure at any
15 given time what she was describing.
16 Q. How long after that first cue of, Daddy, he's he's
17 in the snow or he's turning around, is that final two
18 percussive incidents?
19 A. It's approximately 1 minute 3 seconds later.
20 Q. So a minute and 3 seconds after the 911 tape says
21 he's turning around is when you say the final two percussive
22 incidents occurred?
23 A. That is correct.
24 Q. Would an air bag inflating clip out the microphone?
25 A. I don't know, I have never heard an air bag

1 clipping. An air bag going off, I'm sorry.
2 Q. You testified that you obtained sample sounds of
3 gunshots?
4 A. Yes, I did.
5 Q. Did you try to obtain sample sounds of other
6 incidents that were occurring during that 911 tape?
7 A. I was unaware that an air bag had been deployed.
8 Q. Because the police didn't tell you that part?
9 A. Or I did not remember, I'm not sure which.
10 Q. Would possibly dropping the microphone cause the
11 microphone to clip out?
12 A. It is possible, yes, although I would imagine if it
13 did drop on the ground I would have been able to tell that it
14 had because picking it up would have likely resulted in a
15 scraping sound and it would have clipped for more, it would
16 have clipped for a length of time, I would guess, it would
17 have bounced. I would imagine I would have been able to tell.
18 But to answer your question directly, it is possible, yes.
19 Q. Did you do any investigation regarding other sounds
20 than what they were?
21 A. No.
22 Q. Why not?
23 A. Anytime that you do an investigation you have to
24 limit your focus to certain points. If you don't you could be
25 looking at every single nanosecond of the tape until the cows

1 come home. I could still be working on this case now.
2 Q. So you only focused your investi --
3 MR. VERHAREN: Objection, the witness ought to be allowed
4 to finish his answer.
5 THE COURT: Did you finish your answer, sir?
6 WITNESS ERIC HARMANN: No, I did not.
7 THE COURT: Go ahead, Mr. Hartmann.
8 A. I focused on what Detective Maskell was looking
9 for, yes. Did I also keep my mind open for other events that
10 would happen? Yes, as much as I could, absolutely. But he
11 was looking specifically for the gunshots, it was what he
12 asked us to do the investigation on, it was what I did the
13 investigation on, it was my focus point. But I did listen
14 critically to the tape, to the recording, to see if anything
15 else unusual happened.
16 Q. There are certain decibel levels that any given
17 microphone can accept before it clips out?
18 A. Correct.
19 Q. On this graph that you have, is the higher an
20 individual bar is, is that a decibel level?
21 A. That is correct, yes.
22 Q. So wouldn't it be important to your investigation to
23 know which of those sound levels are above the clip rate of
24 that microphone?
25 A. No, because it doesn't directly equate. In the real

1 world sound decibels are in positive numbers. For example,
2 the hitting of a snare drum will give you someplace around 125
3 decibels, which is a positive number. When sound is
4 translated into audio, because what matters in audio is not
5 clipping in the digital realm, the highest sound that you can
6 get is actually zero decibels. There are many things that
7 take into account sound levels. The most important one is how
8 close you are to a sound source. And I'm sure everyone has
9 seen this, somebody talking when they're a foot away from you
10 is louder than somebody talking 20 feet away from you.
11 I can overload any microphone if I can get close
12 enough to it by simply blowing on it. I can also do the same
13 thing if I hit a gong possibly 10 feet away. There are more
14 things in play with this than simply a single sound pressure
15 level and the sound pressure capability of the microphone.
16 The proximity, the directionality of it all make a difference.
17 Q. And I understand all that, but have you already
18 testified that at a certain point a certain decibel level that
19 microphone is going to clip out?
20 A. Yes.
21 Q. What level on there is where the microphone clips
22 out?
23 A. The level, it has nothing to do with each other,
24 they are mutually exclusive. Like I said, in the real world
25 decibel levels are measured in positive numbers. If I had a

1 decibel reader right here, if you were talking to me and
2 walking away from me, as you got further away from me the
3 decibel level would go down. Based on how it was recorded
4 with the microphone with gain settings and other settings on
5 the microphone, when it's translated into this realm it's
6 completely different.

7 Q. At some point the microphone will clip out?

8 A. Yes.

9 Q. And there's a certain decibel level that will cause
10 the microphone level to clip out?

11 A. Yes.

12 Q. How many decibels did it take to clip out this
13 microphone?

14 A. I don't know.

15 Q. On the 911 tape could you hear the sound of the
16 Blazer hitting the Subaru?

17 A. I have no idea.

18 Q. Could you hear the sound of the Blazer hitting the
19 Honda?

20 MR. VERHAREN: Objection, the witness isn't going to know
21 what vehicles were involved.

22 THE COURT: Sustained without some foundation.

23 Q. (By Mr. Schwartz) Could you hear car crashes
24 occurring on tape?

25 A. I could hear something crashing.

1 characteristics?

2 A. That they were loud percussive transient incidents.
3 Incidents that happened quickly in the beginning with the
4 energy in the front, no real information coming after that
5 except for reflections which are consistent with gunshots.

6 Q. Do you have any doubt at all that in the 911 tapes
7 that you listened to that there are only those five percussive
8 incidents?

9 A. There are sections of the recording where during the
10 screaming or breathing some of the recording was clipped. It
11 is entirely possible there are other percussive incidents
12 masked by the clipping. There is no way for me to say what
13 what the probability is that there were incidents behind the
14 clipping. There would be no way to measure that. All I can
15 do is basically indicate the points that I think are
16 consistent with that type of sound with a percussive
17 incident.

18 Q. And based on that analysis, those five are the only
19 five you found in those 911 tapes?

20 A. That is correct.

21 Q. Here's some questions about, I think, how you were
22 directed by the police to make these findings, do you remember
23 those questions?

24 A. Yes, I do.

25 Q. I think here in this letter that the defense has had

1 Q. How many somethings?

2 A. I labeled one crash incident.

3 Q. One crashing incident, how long did that occur for?

4 MR. VERHAREN: Objection, asked and answered.

5 THE COURT: It may have been, but I think there might be
6 some level of confusion on that point, I'll let the witness
7 answer the question.

8 A. Somewhere around approximately a second and-a-half
9 to two seconds.

10 Q. (By Mr. Schwartz) So from your analysis of the 911
11 tape there was a second and-a-half to two seconds of the
12 vehicles crashing?

13 A. One crashing incident, yes.

14 Q. So there's no more sound of crashing after those two
15 seconds?

16 A. I cannot say that absolutely for sure, no.

17 Q. And you also can't say for sure what these
18 percussive incidents are?

19 A. No, I can only match them to characteristics.

20 MR. SCHWARTZ: I have no further questions, thank you,
21 sir.

22 THE COURT: Mr. Verharen.

23 REDIRECT EXAMINATION

24 BY MR. VERHAREN:

25 Q. Did these percussive instances match what

1 admitted it states that according to the defense the gunfire
2 doesn't exist at the time suggested by the victims' testimony
3 thus supporting the defense's theory that the suspect was
4 fleeing for his life and the shots were fired long before the
5 moment the suspect allegedly targeted the woman in the
6 roadway. Is that part of that letter there?

7 A. That is.

8 Q. Okay. And so at that time that was the request that
9 was given to you by Sergeant Maskell?

10 A. That is correct.

11 Q. Because that was the defense theory at that time?

12 A. Apparently so, yes.

13 MR. SCHWARTZ: Objection, outside of personal knowledge.

14 THE COURT: I think it's based on the exhibit that's
15 admitted. Overruled.

16 Q. (By Mr. Verharen) Had you found any --

17 THE COURT: I'm sorry, did you answer the question, sir?

18 WITNESS ERIC HARTMANN: Yes.

19 THE COURT: Thank you.

20 Q. (By Mr. Verharen) Had you found anything other than
21 what you have told us about here today, these five percussive
22 incidences, the crashing incident, these things happening
23 after that vocal cue, would you have had any hesitation at all
24 in saying so?

25 A. Absolutely not, I would have mentioned anything that

1 I found of any value at all.

2 MR. VERHAREN: No further questions.

3 THE COURT: Anything else, Mr. Schwartz?

4 MR. SCHWARTZ: Just briefly, Your Honor.

5 THE COURT: Certainly.

6 RECROSS EXAMINATION

7 BY MR. SCHWARTZ:

8 Q. You just testified in response to Mr. Verharen's
9 question about that the screaming and breathing could have
10 caused microphone clipping?

11 A. Yes.

12 Q. Did you sync up the original 911 tape with your
13 enhanced one to lay out where the breathing and the screaming
14 was occurring?

15 A. I'm not sure I understand your question.

16 Q. When was the breathing occurring that was clipping
17 out the microphone in comparison to any of these percussive
18 incidents?

19 A. It would be in the middle section where Joleen is
20 screaming and she's in a frenzy.

21 Q. So to your recollection there isn't breathing at the
22 end of the 911 call?

23 A. I'm sure she briefs throughout the entire tape. I
24 can tell you that I do not recall any clipping at all before
25 the vocal cue because she was in a relatively calm state.

1 After that vocal cue when basically everything transpired,
2 most of the clipping would have happened in this section here,
3 but there were some sections later on, yes, where she did
4 breath into the microphone heavy and briefly clip it.

5 Q. And have you compared with these last two proposed
6 percussive incidents with incidents of her breathing into the
7 phone?

8 A. No.

9 MR. SCHWARTZ: No further questions, Your Honor.

10 THE COURT: Thank you. And with that, Mr. Hartmann, you
11 can step down. Can we excuse this gentleman?

12 MR. VERHAREN: Yes, please.

13 THE COURT: Any objection to excusing our witness?

14 MR. SCHWARTZ: No, Your Honor.

15 THE COURT: Thank you very much, Mr. Hartmann, you can
16 step down.

17 WITNESS ERIC HARTMANN: Thank you.

18 THE COURT: We will go ahead and excuse you. With that
19 you can call your next witness, Mr. Verharen.

20 MR. VERHAREN: Thank you, Judge. Anthony Hutchinson.

21 THE COURT: Good afternoon, sir.

22 ANTHONY HUTCHINSON: Good afternoon.

23 THE COURT: If you will come forward and raise your right
24 hand, the clerk will administer the oath.

25 ANTHONY HUTCHISON

1 was called as a witness on behalf of the

2 State, having been first duly

3 sworn, was examined and testified as follows:

4 THE COURT: Why don't you go ahead and have a seat,
5 please.

6 When the witness is comfortable, you can start
7 anytime, Mr. Verharen.

8 MR. VERHAREN: Thank you, Judge.

9 DIRECT EXAMINATION

10 BY MR. VERHAREN:

11 Q. Sir, would you please state your full name and spell
12 your last name.

13 A. Anthony Leon Hutchison. H-u-t-c-h-i-s-o-n.

14 Q. Do you live here in Kootenai County?

15 A. Yes, sir.

16 Q. At some point in your career have you worked for
17 Northern Lakes Fire department?

18 A. Yes, sir.

19 Q. How long did you work for Northern Lakes Fire
20 department?

21 A. A little over nine years.

22 Q. Can you tell us in what capacity?

23 A. Started as a firefighter EMT, and when I resigned I
24 was a lieutenant and paramedic.

25 Q. When did you resign?

1 A. April of this year.

2 Q. And the reason you resigned?

3 MR. SCHWARTZ: Objection, relevance.

4 THE COURT: Sustained.

5 Q. (By Mr. Verharen) Are you engaged in another line
6 of work at this time?

7 A. I'm currently a student.

8 Q. Can you tell us, please, the training it took for
9 you to become an EMT?

10 A. The EMT course is approximately 160 hours, I
11 believe.

12 Q. About 60 hours?

13 A. 160 hours.

14 Q. 160 hours, can you briefly describe the content of
15 the training?

16 A. Everything from trauma management, cardiac
17 management, patient assessment and treatment of trauma and
18 medical patients.

19 Q. As an EMT did you work out in an ambulance and
20 helping people?

21 A. Sometimes, yes.

22 Q. And then at some point you got more training and
23 became a paramedic?

24 A. Yes.

25 Q. How much more training did you get to become a

1 paramedic?
 2 A. I believe the course at Spokane Community College is
 3 roughly 1,400 hours on top of the EMT course.
 4 Q. Can you just generally describe the content of the
 5 paramedic training?
 6 A. In-depth anatomy and physiology, advanced trauma
 7 life support, advanced cardiac life support, drug
 8 administration, pharmacology. It's pretty in-depth medical
 9 training.
 10 Q. Do you have to get licensed to become a paramedic in
 11 Idaho?
 12 A. It's certification in Idaho.
 13 Q. Certification?
 14 A. Yes.
 15 Q. And at some point did you do that?
 16 A. Yes.
 17 Q. When was that?
 18 A. I believe in 2002.
 19 Q. As a paramedic then for Northern Lakes Fire
 20 department, describe what you typically do in that employment?
 21 A. Respond to emergency medical calls and provide
 22 advanced life support when needed.
 23 Q. As a part of your employment there were you often
 24 faced with making a assessment of whether someone was alive or
 25 whether someone was deceased?

1 A. Frequently, yes.
 2 Q. And how often do you think that took place in the
 3 nine years you worked there?
 4 A. Several hundred times I would estimate.
 5 Q. What steps did you take pursuant to your training
 6 and your experience to determine whether or not someone was
 7 alive or deceased?
 8 A. Initially I check for breathing, check for a pulse.
 9 Paramedics can use a ECG or cardiac monitor to detect
 10 electrical activity in the heart. That's primarily the three
 11 things we use.
 12 Q. And at what point would you make a decision that
 13 someone was deceased?
 14 A. Pulseless, no respirations and no electrical
 15 activity on the monitor.
 16 Q. I want to talk about January 1, 2006. And you're
 17 very soft spoken, sir, so if you could try to keep your voice
 18 up or scoot that microphone a little closer to you. At some
 19 point did you respond to Scarcello Road on that date?
 20 A. Yes.
 21 Q. What time did you get the call?
 22 A. According to my report we were dispatched at 1239 in
 23 the afternoon.
 24 Q. Were you at Northern Lakes Fire department when you
 25 left to go to Scarcello Road?

1 A. Yes, I was at station 2 in Rathdrum.
 2 Q. How did you get there?
 3 A. By ambulance.
 4 Q. What time did you get there?
 5 A. The first unit arrived on scene at 1247. The unit I
 6 was on was shortly behind that.
 7 Q. How long behind it?
 8 A. Roughly 20 seconds, maybe twice that, I don't recall
 9 for sure.
 10 Q. Describe what you could see there on Scarcello when
 11 you got there?
 12 A. When I arrived there was a small car on the north
 13 side of the road. There was a deputy on scene, and Burt
 14 Manes, another paramedic out of my station, was already on
 15 scene. And he was with a female that was lying in the middle
 16 of the road supine with a substantial amount of blood loss.
 17 Q. Did you go to that woman?
 18 A. Yes.
 19 Q. Did you take any steps to attempt to help her?
 20 A. Mr. Manes had already determined that she was
 21 pulseless and had no respirations, so we attached a cardiac
 22 monitor and she was asystolic, meaning there was no activity
 23 there. And per our protocol, with extensive amount of head
 24 injury she had, we did not attempt resuscitation.
 25 Q. Are you comfortable in saying that at the time you

1 were there and looked at her that she was deceased?
 2 A. Definitely, yes, sir.
 3 Q. Were you able to obtain her identity?
 4 A. No, we did not.
 5 Q. At some point did you obtain her identity?
 6 A. I don't believe I even had that for my report, no.
 7 Q. How long were you there?
 8 A. The last unit cleared the scene at 1331, so
 9 approximately 45 minutes.
 10 MR. VERHAREN: No further questions.
 11 MR. SCHWARTZ: We have no questions, Your Honor.
 12 THE COURT: Thank you. Mr. Hutchinson, you can step
 13 down, thank you.
 14 ANTHONY HUTCHINSON: Thank you.
 15 THE COURT: Can we excuse this witness?
 16 Any objection?
 17 MR. SCHWARTZ: No objection, Your Honor.
 18 MR. VERHAREN: Yes, please.
 19 THE COURT: Thank you very much, sir, you're excused.
 20 MR. VERHAREN: Jerry Groth is my next one, Judge.
 21 THE COURT: Jerry Groth.
 22 Good afternoon, sir.
 23 JERRY GROTH: Hello.
 24 THE COURT: If you will come forward and raise your right
 25 hand, the clerk will administer the oath.

1 JERRY GROTH
2 was called as a witness on behalf of the
3 State, having been first duly
4 sworn, was examined and testified as follows:
5 THE COURT: Go ahead and have a seat. Anytime you're
6 ready, Mr. Verharen.
7 MR. VERHAREN: Thank you, Judge.
8 DIRECT EXAMINATION
9 BY MR. VERHAREN:
10 Q. Sir, would you please state your full name and spell
11 your last name.
12 A. Jerry Lee Groth. G-r-o-t-h.
13 Q. What town do you live in, sir?
14 A. Athol, Idaho.
15 Q. Do you work for a company here in town?
16 A. Yes, Forest Steel.
17 Q. How long have you been working for Forest Steel?
18 A. Fourteen years.
19 Q. In that 14 years what have you been doing for Forest
20 Steel?
21 A. Mostly drive semi-truck, delivering steel. Now I'm
22 a supervisor.
23 Q. I want to take you to January 1, 2006. On that
24 particular date did you find yourself driving down Brunner and
25 then southbound on Ramsey?

1 Q. It's got a little button on it, you press it.
2 A. Okay.
3 Q. It's easier that getting up and putting your finger
4 on something.
5 A. Okay.
6 Q. I'm going to stick this up before you. And if you
7 can show us, please, and get yourself orientated, I realize
8 you haven't seen this before. Get yourself orientated and
9 show us where you were turning.
10 A. I was coming westbound on Brunner and I turned south
11 on Ramsey, and right about in here is where I saw them coming
12 at me. I was about right about there when I saw them coming
13 northbound.
14 Q. Which car was first and which car was second?
15 A. There was white four door, kind of a compact, I
16 didn't know the make of it, I didn't really see that, but it
17 was a white four door.
18 Q. And what was the car behind the white car?
19 A. What I saw it seemed like a Blazer, like a two door,
20 full-time Blazer, pretty good size Blazer.
21 Q. So what was it about those two cars coming up the
22 road that caught your attention?
23 A. Just the fact that the one behind was so close. I
24 pay attention to those kinds of things when I drive.
25 Q. How close is close?

1 A. Yes.
2 Q. About what time do you think that was?
3 A. It was between about 11:05 and 11:15, right in that
4 area.
5 Q. In the morning?
6 A. Yes.
7 Q. What were you driving?
8 A. A Geo Metro.
9 Q. What color?
10 A. Red.
11 Q. Was there anybody else with you?
12 A. No.
13 Q. Where were you headed to?
14 A. To Post Falls.
15 Q. As you turned off of Brunner did anything catch your
16 attention onto Ramsey?
17 A. I saw two vehicles coming northbound, a white car
18 and another vehicle behind it, looked like a Blazer. What I
19 noticed was the one behind, my first thoughts were, well,
20 either they're towing them or they're tailgating because they
21 were very close.
22 Q. Let me put a diagram up for you. You have that
23 laser pointer right there in front of you, do you know how to
24 work one of those?
25 A. No.

1 A. I couldn't imagine they would be together a rig like
2 that with the car it was. Couldn't have been much over a car
3 length behind it.
4 Q. So did you drive past the two cars at that point?
5 A. Yes.
6 Q. What happened as you drove past?
7 A. I was barely getting past when the rear vehicle
8 swerved around to pass.
9 Q. Which vehicle was that again?
10 A. The Blazer.
11 Q. What do you mean by just barely passing?
12 A. The rear of my vehicle is about even closer to the
13 rear of the Blazer and it swung out really quick. It was kind
14 of disturbing because I was barely getting by.
15 Q. As you were driving past the Blazer, about how far
16 do you think you were from the driver of the Blazer?
17 A. Probably about ten feet roughly, maybe a little
18 more.
19 Q. At that distance were you able to get a good look at
20 the driver of the Blazer as you went past him?
21 A. Yes.
22 Q. After the driver of the Blazer got in your lane, I
23 assume he got in your lane to pass the white car?
24 A. Yes.
25 Q. Did you watch what happened?

1 A. I just saw him go around passing and kind of went
2 into the distance behind me and I couldn't see much more after
3 that. Saw him pass and I didn't exactly see him come back in
4 again.
5 Starts to go down hill a little bit so I was losing
6 a little bit of sight.
7 Q. Let me show you a photograph marked as Plaintiff's
8 exhibit 85. Have you ever seen this photograph before?
9 A. No, not that one.
10 Q. Do you recognize the person in it?
11 A. I don't know him, but looks a lot like the driver of
12 the rear vehicle.
13 Q. The driver of the rear vehicle, what was he wearing
14 that day?
15 A. Seemed like a baseball cap, I remember, not exactly
16 a baseball cap but a baseball style cap. I didn't really pay
17 attention to a shirt or anything, just kind of looked at the
18 face. Seemed like he had more of a scruffy beard than in that
19 picture, too, to me.
20 Q. Is this a fairly accurate photograph of the person
21 driving the Blazer that day?
22 A. Yeah, I'd say so.
23 Q. Looking around the courtroom, is that person here
24 today that's represented in Plaintiff's 85?
25 A. It would appear to be him from my memory.

1 Q. Him being who?
2 A. I suppose the defendant here.
3 Q. The person in the red shirt seated next to his
4 attorney?
5 A. Yes.
6 Q. At some point did you call the police about this?
7 A. No.
8 Q. Did you ever talk to a police officer after this
9 happened?
10 A. No.
11 Q. Did you ever talk to a deputy about this?
12 A. Yeah, I read an account a little bit in the paper
13 and I thought that seems like something like I had seen, so I
14 called and told them what I had seen.
15 Q. When was this?
16 A. It was a day or so after, I can't remember the exact
17 date, a day or so after that.
18 Q. So you called the sheriff's department and talked to
19 a deputy?
20 A. Yes.
21 Q. Do you know Jonathan Ellington?
22 A. No.
23 Q. Do you know the Larsen family?
24 A. No.
25 MR. VERHAREN: No further questions.

1 THE COURT: Cross-examination.
2 MR. SCHWARTZ: Thank you, Your Honor.
3 CROSS-EXAMINATION
4 BY MR. SCHWARTZ:
5 Q. Good afternoon, sir.
6 A. Hello.
7 Q. What happened between the white car and the Blazer
8 before you got there?
9 A. All I know, all I saw was what I said that they were
10 going northbound and the one behind was real close. That's
11 all I know of.
12 Q. So you don't know what happened before?
13 A. No.
14 Q. And you don't know what happened after?
15 A. No, just later on I did from the paper accounts and
16 whatever, but not as far as then, no.
17 Q. And you just testified that you don't know
18 Mr. Ellington. Do you know anyone that knows him?
19 A. No.
20 MR. SCHWARTZ: No further questions, Your Honor.
21 THE COURT: Anything else?
22 MR. VERHAREN: No, Judge.
23 THE COURT: Sir, you can step down. Can we excuse this
24 witness?
25 MR. VERHAREN: Yes, please.

1 MR. SCHWARTZ: No objection, Your Honor.
2 THE COURT: Thank you very much, sir, you are free to
3 leave.
4 Call your next witness.
5 MR. VERHAREN: Thank you, Judge. Trooper Robnett.
6 MS. TAYLOR: Your Honor, I'm sorry, I have the Skeltons
7 on the way in anticipating that he was coming next, and I
8 think I need about ten minutes before they get here. I
9 apologize.
10 THE COURT: We'll take a few minutes and then we'll take
11 Trooper Robnett's testimony.
12 Members of the jury, again I'd admonish you again
13 not to discuss the case among yourselves, nor with others, nor
14 shall you form or express an opinion about it until it is
15 finally submitted to you. With that we will be in recess for
16 a few minutes.
17 (Recess)
18 (JURY IS PRESENT)
19 THE COURT: Looks like our jury is all back, you can call
20 your next witness.
21 MR. VERHAREN: Trooper Robnett.
22 THE COURT: Trooper Robnett, good afternoon, sir.
23 TROOPER ROBNETT: Good afternoon.
24 THE COURT: If you will come forward and raise your right
25 hand, the clerk will administer the oath.

1 where did you get the information to put that evidence in the
2 diagram?

3 A. What I did, there's an acceleration mark and it's
4 depicted here in this picture. This acceleration mark is left
5 from the rear. This is acceleration mark left from the front
6 end. I drew this part from the width of this Blazer. I then
7 married it up with this curve and married it up with the
8 existing marks that Trooper Robnett measured.

9 Q. In terms of the basis for these marks here, did you
10 rely on photographs of the acceleration marks from the side of
11 the road around the Honda to Mrs. Larsen?

12 A. Yes, sir.

13 Q. Is that one of the components that you used in
14 making these marks here?

15 A. Yes, sir.

16 Q. And then finally, this last part here, I know you
17 have touched on it briefly, but where did you get the
18 information to put that in there?

19 A. That is nothing more than rebuilding this piece
20 right here, but putting a Blazer into it. Putting a vehicle
21 into that and showing different steps where a vehicle would be
22 as it traverses this curve.

23 Q. Where did you get that vehicle that you just plugged
24 in there?

25 A. It was on the computer.

1 Q. And is that --

2 A. It's a Blazer. It's a '73 Chevy Blazer, '74.

3 Q. Approximately?

4 A. Same wheelbase, same length.

5 Q. So you plugged that in in terms of the distance of
6 the tires?

7 A. Yes.

8 Q. As well as the length of the Blazer's?

9 A. Yes, sir.

10 Q. Essentially you have different diagrams of the same
11 vehicle showing a turning radius there?

12 A. Correct.

13 Q. Is that all consistent with the photographs you saw
14 in this case?

15 A. Yes, sir.

16 Q. So essentially these parts of your diagram, this
17 part right here, this part right here, and this part right
18 here, are based on your training and experience in terms of
19 reconstruction?

20 A. Yes, sir.

21 Q. Would this diagram help you explain your testimony
22 to the jury?

23 A. Yes, sir.

24 MR. VERHAREN: Move to admit 146.

25 MS. TAYLOR: May I, please?

1 THE COURT: Please.

2 VOIR DIRE EXAMINATION

3 BY MS. TAYLOR:

4 Q. Do I call you detective?

5 A. Yes, ma'am.

6 Q. Detective, speaking of those lines right here, is
7 there an actual photograph of those lines?

8 A. No, ma'am.

9 Q. So this is just kind of guesswork on your part,
10 these lines?

11 A. I would not use the word guess. I just drew a
12 straight line into the area at the front of the Subaru.

13 Q. You would have no idea if the curve to avoid the
14 Subaru began sooner, correct?

15 A. Sooner than where, ma'am?

16 Q. Than where you have the lines down to?

17 A. That's fair, that's good.

18 Q. So it's kind of speculative on your part to draw it
19 straight, would you agree with that?

20 A. I agree with that.

21 Q. Let's move over to these lines right here. Did you
22 actually use a photograph to fill those in or is that just your
23 estimation?

24 A. No, what I did was took the photograph and I don't
25 know if there has been any testimony given on short-lived

1 evidence.

2 These marks are much further in the photographs than
3 what are depicted here in the scaled drawing of Trooper
4 Robnett. What I did was match up this car and work it
5 backwards through here, putting it back into these marks.
6 Marrying it back up with the mark in the dirt and the
7 acceleration mark. But it is not to scale.

8 Q. That part is not to scale?

9 A. That's not to scale.

10 Q. That is kind of speculation on your part?

11 A. I think it's going to be pretty close.

12 Q. And that's based on photographs?

13 A. Photographs and the wheelbase.

14 Q. Do you have a degree in measuring photographs and
15 using photographs?

16 A. No, I don't have any degrees.

17 MS. TAYLOR: We will object. I think there is speculative
18 areas in there.

19 THE COURT: Mr. Verharen, could you bring the exhibit
20 back, I had a question of the trooper here.

21 Just so I'm clear, Trooper, the broken lines are not
22 evidence that you saw from the scene or from photographs or
23 from Trooper Robnett's reports; is that correct?

24 WITNESS SEAN DALY: That's correct.

25 THE COURT: Those are what you have added in to give you

1 a visual idea of what may have transpired, is that a fair
2 statement?

3 WITNESS SEAN DALY: Yes, sir.

4 THE COURT: The other question is that little section
5 where you superimposed over some marks what appears to be your
6 Blazer?

7 WITNESS SEAN DALY: Yes, sir.

8 THE COURT: My mechanics aren't very good. It doesn't
9 make much sense, I'm not sure I understand how the second
10 picture, if you go from left to right, how that can get into
11 that position without having reversed further than you have it
12 in the diagram, does that make sense to you?

13 WITNESS SEAN DALY: Yes, it does, it makes very much
14 sense, sir. He goes back up and comes to this, and then moves
15 forward, comes around. I don't have it all like a cartoon is
16 being drawn.

17 THE COURT: All right. There certainly may be some
18 speculation to the exhibits, but I think the foundation, and
19 certainly provided that's properly clarified it for the jury.
20 I know we have talked quite a bit here without the jury being
21 able to see it.

22 With that clarification, I think the exhibit can be
23 admitted.

24 Mr. Verharen, you can go ahead.

25 MR. VERHAREN: Thank you.

1 A. Yes, sir.

2 Q. Let's focus on the Blazer, first of all. Give us a
3 brief description of these, I'll just go three at a time here.
4 I'll show you the first three. 86, 87 and 88, if you can just
5 briefly address what each one of the photographs depict?

6 A. This is a photograph of the driver's side of the
7 Blazer. This is a picture showing the front end of the
8 driver's side corner of the Blazer. This is underneath and
9 showing the front bumper area and the bumper guard of the
10 Blazer.

11 Q. Three more, 89, 90 and 91?

12 A. Underbody of the Blazer, the bumper guard of the
13 Blazer, driver's side, and the underbody of the Blazer.

14 Q. 92, 93, 94 and 96, what are they?

15 If you could briefly, when you describe one of
16 those, just make sure you say the exhibit number so we know
17 which one you're talking about?

18 A. Okay. This is called a recovery hook, it's on the
19 driver's side of the Blazer as depicted in exhibit 92. This
20 is the underbody of the Blazer showing the leaf spring area
21 and the hanging bumper guard that's depicted in 93. The
22 driver's side of the Blazer door, the door fender and rear
23 quarter area in exhibit 94. The Blazer with the door open,
24 driver's side, exhibit 95. And 96 are showing, it's a
25 close-up view of the end of the damage of the Blazer on the

1 DIRECT EXAMINATION (cont'd)

2 BY MR. VERHAREN:

3 Q. At some point in your investigation of --

4 THE COURT: Excuse me, Mr. Verharen. Let's go ahead and
5 clarify some of those foundation questions for the jury, if
6 you're going to start to show it to the jury.

7 MR. VERHAREN: I wasn't going to do that yet.

8 THE COURT: But when you get ready to do that, I'd
9 appreciate that.

10 Q. (By Mr. Verharen) Did you ever take some
11 photographs of the vehicles connected with this incident?

12 A. Yes, sir.

13 Q. Was there a time when you were ever at the Kootenai
14 County impound yard with Detective Swanson, where he was
15 taking photographs of the Blazer?

16 A. Yes, sir.

17 Q. What was the reason that you were there?

18 A. Actually we were taking pictures of the Honda and
19 the Subaru. We had been called to, by Detective Maskell, to
20 assist him in processing the vehicles. The vehicles, one was
21 in, the Blazer was in a garage located on the grounds of the
22 sheriff's department, and inside the impound yard was a white
23 Honda and a red Subaru. And we process those vehicles, looked
24 through them looking for physical evidence left on the Blazer.

25 Q. During that process photographs were taken?

1 driver's door with some red paint chips.

2 Q. Those are photographs you took on the the 4th of
3 January?

4 A. 3rd of January.

5 Q. 3rd of January, 2006?

6 A. Detective Swanson actually took them, I was there.

7 Q. But you were there when he took them?

8 A. Yes, sir.

9 Q. These are accurate photographs of these specific
10 parts of the Blazer?

11 A. Yes.

12 MR. VERHAREN: Move to admit 86 through 96.

13 MS. TAYLOR: Your Honor, we will have no objection to all
14 but 95. We object to 95. Request to be heard at a later
15 time.

16 THE COURT: Let me look at 95.

17 Numbers again, Mr. Verharen?

18 MR. VERHAREN: 86 through 96.

19 THE COURT: 86 through 96 will be admitted with the
20 exception of 95, and we can visit on our next break.

21 Q. (By Mr. Verharen) And finally, Detective, 108 and
22 109, what are those two?

23 A. 108 is the front end of the Blazer, and 109 is the
24 rear of the Blazer.

25 MR. VERHAREN: Move to admit 108 and 109.

1 MS. TAYLOR: No objection to either of those, Your Honor.
 2 THE COURT: 108 and 109 can be admitted.
 3 Q. (By Mr. Verharen) How many times do you think in
 4 your investigation you looked at the Blazer?
 5 A. Maybe a half a dozen or more.
 6 Q. Did you ever at some point get in that Blazer and
 7 start it up and drive it?
 8 A. Yes, sir.
 9 Q. Do you recall when you did that?
 10 A. I don't recall a specific date, late in January
 11 possibly, late in January of this year, 2006.
 12 Q. What was the purpose for your doing that?
 13 A. The evidence left on the roadway and on the vehicle,
 14 I wanted to see specifically if the vehicle was in four-wheel
 15 drive at the time of the incident, and whether it was or not I
 16 needed to drive the vehicle and see. The vehicle is an older
 17 vehicle. We all work on our own cars and the mechanics aren't
 18 lined up perfectly like they do at the factory. The indicator
 19 for the four-wheel drive wasn't lined up perfectly, that the
 20 shifter for the four-wheel drive wasn't lined up straight
 21 across from where they would be in the newer rigs indicating
 22 it was in four-wheel drive or not in four-wheel drive.
 23 Q. So what steps did you take to establish what it took
 24 to put this vehicle into four-wheel drive?
 25 A. First of all I took photographs of the shift

1 investigation of the Blazer?
 2 A. Yes, sir.
 3 Q. Between that time and the time that you actually
 4 manipulated the four-wheel drive mechanism of that vehicle, to
 5 your knowledge was that ever manipulated by anybody else while
 6 it was at the sheriff's department?
 7 A. To my knowledge it was not.
 8 Q. Let's go to the day here that you conducted your, I
 9 guess, your driving of the Blazer. I think you have told us
 10 already that when you got in it that day it was in four-wheel
 11 drive?
 12 A. Yes, sir.
 13 Q. What did you do after you discovered that?
 14 A. I put it in two-wheel drive.
 15 Q. How did you do that?
 16 A. Just moved the shift lever forward a notch.
 17 Q. Did you take a couple of photographs while you were
 18 doing that?
 19 A. Yes, sir.
 20 Q. Then what did you do?
 21 A. I drove it to a part of the parking lot where I was
 22 going to spin the tires, I was going to accelerate at a very
 23 high rate of speed, or rapidly. I'd rather say rapidly.
 24 Accelerate rapidly, try to get the tires to spin on the
 25 Blazer. I took it to an where where, if I lost control or

1 indicator to see where it was. And then I moved the
 2 mechanism, moved the shifter to see where it was. I started
 3 the vehicle up. I moved the shifter to see which part it was
 4 in, whether it was in two-wheel drive or four-wheel drive.
 5 Started the vehicle up.
 6 Q. What did you discover?
 7 A. I discovered the vehicle was in four-wheel drive at
 8 the time of the incident.
 9 MS. TAYLOR: Your Honor, I'm going to object and move to
 10 strike. I don't think he examined it right after the incident.
 11 THE COURT: I'll sustain, it lacks foundation as to being
 12 able to testify at the time of the incident, and I'd strike
 13 that testimony until the foundation has been established.
 14 Q. (By Mr. Verharen) On the 3rd of January 2006 when
 15 you went with Detective Swanson to inspect that vehicle, can
 16 you describe the vehicle in terms of seals, please?
 17 A. Around the vehicle, when we impound a vehicle, when
 18 a vehicle is impounded we take a little piece of evidence tape
 19 and mark it and tape it to the door around a window, the hood,
 20 the trunk, anyplace that that vehicle can be opened up and
 21 someone could gain entry to. A date and initials are put on
 22 that, that's what I do anyway. When we arrived on the 3rd of
 23 January, all of those seals were still intact and none had
 24 been broken.
 25 Q. So it was on that day that you started your first

1 something, I wouldn't hurt anybody. I did exactly that.
 2 Q. What was your rationale in trying to make some skid
 3 marks there at the impound yard?
 4 A. I wanted acceleration marks is what I was after, not
 5 skid marks. My rationale there was I wanted to see what tire
 6 spun under power. I fully intend to put the gas pedal all the
 7 way to the floor of that Blazer and I wanted to see what tire
 8 spun when it was in two-wheel drive and which tire spun when
 9 it was in four-wheel drive.
 10 Q. Why did you want to do that?
 11 A. There was some physical evidence left on the side of
 12 the white Honda from the crash, from the incident. It
 13 wouldn't be able to have been left there unless the left front
 14 tire would be spinning. I had to determine if the left front
 15 tire would be spinning if it was in two-wheel drive.
 16 Q. So in terms of your experiment here, describe what
 17 you found?
 18 A. In two-wheel drive I started the truck, the Blazer
 19 up, let it warm up real good. It was a frosty morning, and I
 20 backed up near a fence and I accelerated the vehicle, and
 21 found that the right rear tire was the only tire that spun. I
 22 stopped the vehicle, went back and took photographs of the
 23 marks in the dirt that it made just from the tire spinning.
 24 Then I took the shifter lever and I put the vehicle
 25 in four-wheel drive and moved it over out of the path that I

1 had just made, and accelerated again. I noticed that the
 2 right rear was spinning and the left rear spun a very short
 3 distance, and the left front spun the entire distance, as well
 4 as the right rear.
 5 Q. Take a photograph of that as well?
 6 A. Yes, sir, I did.
 7 Q. Take a look at those photographs, four of them, 130
 8 to 133. Start with 130, what's that a photograph of?
 9 A. This is a photograph of the back tire where it spun.
 10 This is the first experiment I did where it churned up the
 11 earth.
 12 Q. Where you had it in two-wheel drive?
 13 A. Two-wheel drive, exhibit 130.
 14 Q. How about 131?
 15 A. This is a picture of the shifter indicator, 131,
 16 shift indicator with the vehicle in two-wheel drive.
 17 Q. How about 132?
 18 A. 132 is a picture of the same shift indicator, same
 19 angle as I hoped to get with the vehicle in four-wheel drive.
 20 Q. What's 133 a photograph of?
 21 A. This is the photograph I took of the vehicle where
 22 both tires are spinning leaving marks in the frosty ground.
 23 Q. After you put it in four-wheel drive?
 24 A. After I put it in four-wheel drive.
 25 Q. Those are all accurate pictures of your testimony

1 Chevrolet motor, 4-barrel engine.
 2 Q. What kind of transmission does it have?
 3 A. It has an automatic transmission, I know that.
 4 Q. Where is the shifter?
 5 A. It's on the steering column.
 6 Q. The shifter for the four-wheel drive is located
 7 where?
 8 A. On the floor just forward of the bucket seat.
 9 Q. If a person wants to put that vehicle, describe the
 10 four-wheel drive apparatus on that Blazer for us?
 11 A. The shifter?
 12 Q. No, how it works in that vehicle?
 13 A. Inside the transfer case there is a series --
 14 MS. TAYLOR: Your Honor, I'm going to object. I'd like a
 15 little more foundation before he testifies about this.
 16 THE COURT: I don't know how deep with with the mechanics
 17 we're going to get with the response. If that's where you're
 18 headed, I think it requires more foundation.
 19 Q. (By Mr. Verharen) How does one go about putting
 20 that vehicle in four-wheel drive?
 21 A. Just pull on the shifter lever. If you're driving
 22 down the road, it's a full-time four-wheel drive vehicle.
 23 It's four-wheel drive, you have a choice of four-wheel drive
 24 lock or four-wheel drive. So all you have to do in this case
 25 to go to the high is pull back on the shifter. You don't have

1 here?
 2 A. Yes, sir.
 3 Q. This was when?
 4 A. End of January.
 5 Q. In 2006?
 6 A. Yes, sir.
 7 MR. VERHAREN: Move to admit 130 to 133.
 8 MS. TAYLOR: Your Honor, I think we'll object, they're
 9 not relevant and his tests were obviously conducted on a
 10 different surface and different circumstances than this
 11 accident occurred.
 12 THE COURT: If I understand you're not offering this to
 13 show or match up patterns in the roadway, but simply to show
 14 how the difference between the four-wheel drive and the
 15 two-wheel drive as it pertains to the drive wheels involved,
 16 is that correct?
 17 MR. VERHAREN: Yes, sir.
 18 THE COURT: I think that's the foundation that was laid.
 19 I'll overrule, allow the exhibits to be admitted.
 20 Q. (By Mr. Verharen) In terms of your work with the
 21 Blazer, at some point did you determine what it was powered by
 22 generally?
 23 A. Yes, sir.
 24 Q. Can you describe that for us?
 25 A. The vehicle is powered by a 350, it's a V-8

1 to get out and lock any hubs or anything like that, no,
 2 full-time hubs.
 3 Q. At some point did you determine how high the hood of
 4 the Blazer is from the ground?
 5 A. Yes, sir.
 6 Q. How many inches is it?
 7 A. 48 inches, and I measured the hood at the center of
 8 the hood.
 9 Q. So from the top of the hood to the ground is it four
 10 feet?
 11 A. That's correct.
 12 Q. How about the length of the Blazer, how long is it?
 13 A. Approximately 15 feet 9 inches.
 14 Q. How wide is it?
 15 A. Approximately 6 feet 3 inches, I believe is correct.
 16 Q. If you could come out, with the court's permission,
 17 if you could step out of your chair there and we will go
 18 through these briefly. You can describe for the jury what you
 19 have here. Make sure you reference the exhibit number. Let
 20 me get out of your way.
 21 A. First I'm going to reference exhibit 130. This is a
 22 picture of the first day that I went and took a photograph of
 23 the track left by the Blazer. I started it up, pulled
 24 backwards near this fence and accelerated that Blazer as hard
 25 as I could get it to go. That allowed me to see which the

1 driver tire was in two-wheel drive. The path that is left
2 here, it starts at the back and comes forward this way towards
3 the bottom of the photo. That's the direction I was
4 traveling.

5 Q. What tire is leaving that mark?

6 A. The right rear tire of the vehicle is leaving that
7 mark. The next exhibit is exhibit 130. As I talked about
8 just a minute ago, you can see the shift indicator doesn't
9 line up next to the H where it should be in two-wheel drive.
10 It lines up next to H lock as indicated here in four-wheel
11 drive in the lock mode. That's exhibit 131.

12 132, I pulled back on the shifter. This is the way
13 I found the shifter. As you can see the rubber boot protrudes
14 past the ring on the bottom. That also indicates it holds
15 down the indicator for the shifter level. That's exhibit
16 132.

17 133, this is the last test I did. Here is the right
18 rear tire. Here is the left rear tire spinning for a short
19 distance. But the left front tire spins the entire distance.
20 That's in four-wheel drive locked.

21 Q. You can take your seat again. When this vehicle is
22 in four-wheel drive, what are the power tires?

23 A. The tires that provide power is the left front tire
24 and the right front tire and the left rear tire under heavy
25 acceleration,. Actually it does all the time.

1 Q. When you were conducting these experiments with the
2 Blazer, at some point did you get an opportunity to assess the
3 steering of the Blazer?

4 A. I didn't crawl underneath to look to see if the
5 steering was working, it was working fine when I drove it. I
6 didn't have any problem with it. We had examined underneath
7 the. On the third of January when we went and looked at the
8 Blazer, we had also moved it over to the county yard, the part
9 of the county shops where they work on the sheriff's
10 department vehicles and put it on a hoist and lift it in the
11 air, got to look at everything underneath the vehicle. I had
12 crawled under it earlier but now we have it in the air. I
13 didn't see anything wrong with the steering or anything that
14 would indicate that caused the steering to malfunction.

15 MS. TAYLOR: Your Honor, I'm going to move to strike, I
16 don't think he has the foundation for anything wrong with the
17 steering.

18 THE COURT: Sustained.

19 Q. (By Mr. Verharen) have you been working with cars
20 for awhile?

21 A. Yes, sir.

22 Q. How long have you been worked with cars?

23 A. About 36 years.

24 Q. How old were you when you first started working with
25 cars?

1 A. Twelve.

2 Q. Can you describe what you have done since you have
3 been 12 years old working with cars?

4 A. My father gave us a '56 Pontiac station wagon, my
5 brother and I, when I was 12 years old. We bouth hot rod
6 magazines and took the car apart and put it back together as
7 we learned in this magazine. Since then I have replaced
8 numerous engines. I don't know how to paint a car, but I can
9 do just about anything there is to the older cars. I've got
10 a '68 GTO right now that I stripped down and I couldn't take
11 anything else off except the body off the frame. I put it
12 together all by myself and drive it all the time, it works
13 great. I have two other cars I'm going to do. I have done
14 previous cars in the past, I've rebuilt them, and I've done
15 all the work myself. If I don't know how to do it, I get the
16 literature and learn how to do it.

17 Q. You have been doing this since you have been 12
18 until, how old are you now?

19 A. I'm 48.

20 Q. You have been doing that since that time period?

21 A. Yes, sir.

22 Q. You feel like you have gained a pretty good
23 understanding of how a car works based on rebuilding them over
24 the years?

25 A. Yes, sir.

1 Q. Did you see any sign when you were inspecting the
2 steering mechanism of the Blazer of any type of problem.

3 MS. TAYLOR: Your Honor, objection, I still don't think
4 that's proper foundation that he can put a car together,
5 whether he can identify any potential problem.

6 THE COURT: Maybe we should be a little more specific on
7 the steering mechanism.

8 MR. VERHAREN: Yes, sir.

9 Q. (By Mr. Verharen) Have you, in the past, ever
10 dealt with the steering mechanism on a vehicle in terms of
11 fixing it or rebuilding it?

12 A. Yes, sir.

13 Q. Can you describe that for us, please?

14 A. When I rebuild a car, I buy every part there is to
15 rebuild the front end, from the bearings that hold the drums
16 or rotors on, to the tie rod ends, to the idle arm, to the
17 pitman arm, to the idle ring, to every piece that goes in
18 between the wheels and allows them to steer together. I don't
19 know how to align a front end. Les Schwab does that for me.
20 I get that all together and I tear everything else out, and if
21 it's bad, I throw it away and buy new stuff. I've rebuilt
22 things, put it all back together. I've replaced pieces and
23 put them back so the vehicle will steer correctly and be a
24 safe vehicle going down the road.

25 Q. How many times do you think you have replaced the

1 steering parts on a vehicle?

2 A. Lots, I don't have a specific, many, many, many
3 times over the years.

4 Q. How many times have you repaired the parts of a
5 steering mechanism on a vehicle?

6 A. I don't have a specific number, Mr. Verharen. Lots
7 of times I have even done it for other people.

8 Q. Many times?

9 A. Many times.

10 Q. When you looked at this Blazer after you got it
11 jacked up at the county yard there, did you see any signs that
12 the steering mechanism had problems?

13 MS. TAYLOR: Your Honor, may I just ask a couple of
14 questions in aid of the objection?

15 THE COURT: That would be fine.

16 VOIR DIRE EXAMINATION

17 BY MS. TAYLOR:

18 Q. Detective, did you take apart the steering apparatus
19 on the Blazer?

20 A. No, ma'am.

21 Q. So any testimony that you're about to give is simply
22 from driving it; is that correct?

23 A. No, ma'am.

24 Q. You didn't take it apart and examine the pieces
25 though, correct?

1 mechanism?

2 A. No.

3 Q. So when you were driving this thing did you get an
4 opportunity to brake?

5 A. Yes, sir.

6 Q. Can you tell us about the brakes on the Blazer?

7 A. The brakes are just that, there's a braking system,
8 power brakes to the master cylinder, power assist. Pressed on
9 the brakes and I stopped.

10 Q. Brakes worked?

11 A. Brakes worked.

12 Q. About how heavy is this Blazer?

13 MS. TAYLOR: Your Honor, objection, speculation,
14 foundation.

15 THE COURT: Sustained.

16 Q. (By Mr. Verharen) In terms of preparing yourself
17 for testifying in regards to this Blazer, did you do any
18 homework?

19 A. Yes, sir.

20 Q. Can you describe that homework?

21 A. I looked on the Internet for specifics,
22 specifications of this Blazer or a vehicle similar to the
23 Blazer.

24 Q. I think you told us you owned a pickup truck that
25 was very similar to the Blazer?

1 A. Correct.

2 Q. Are you trained to diagnose any problem that may
3 happen with steering on a Blazer of this year?

4 A. Can you be more specific in training? I have
5 trained myself.

6 Q. You don't hold any degrees?

7 A. No degrees, ma'am.

8 Q. You didn't attend school to become a vehicle
9 mechanic or to do vehicle repair, correct?

10 A. That's correct.

11 Q. And your own vehicles didn't have a Blazer of this
12 same year and model, correct?

13 A. No. I have owned a vehicle that is very close to
14 this year that I have done work on, although it's not a
15 Blazer, it's a Chevy pickup and it's the same thing. The
16 parts are interchangeable, that's how close they are, but I
17 have never owned a Blazer like this, no, ma'am.

18 MS. TAYLOR: Thank you. Judge, our objection is still
19 foundation.

20 THE COURT: That might go to the weight. I think, well,
21 I don't know that you have asked the question yet again.

22 Go ahead and ask the question, Mr. Verharen.

23 Q. (By Mr. Verharen) You have already told us that
24 thing steered fine. When you were looking at it underneath
25 it, did you see any apparent problems with the steering

1 A. Yes, sir.

2 Q. Can you describe that for us, please?

3 A. I had a 1976 Chevrolet short box, four-wheel drive
4 pickup, it was black. That's about it.

5 Q. Was that the approximate weight of this Blazer, that
6 pickup truck?

7 A. Approximately, yes.

8 Q. Based on your prior ownership of this pickup truck
9 as well as your investigation into the weight of the Blazer,
10 did you come up with a rough idea of how much the Blazer
11 weighed?

12 A. Yes.

13 Q. Tell us what that is?

14 MS. TAYLOR: Objection, speculation.

15 THE COURT: Overruled.

16 A. About 4,300 pounds.

17 Q. (By Mr. Verharen) The day that you looked at the
18 Subaru and there were some photographs taken of the Subaru, do
19 you recall when that was?

20 A. Had to have been the 4th of January.

21 Q. Did you take photographs of the Subaru or did
22 Detective Swanson?

23 A. Detective Swanson took the photographs.

24 Q. You were there at the same time, though?

25 A. Yes, sir.

1 Q. I'll hand you three, and if you could read off the
2 exhibit and tell us what generally each one reflects?

3 A. This is exhibit 110, it's a picture of the right
4 front of the Subaru. It's taken at an angle of the right
5 front of the Subaru.

6 Exhibit 111, it's the driver's side of the Subaru.
7 And 112 is a different angle of the driver's side of the
8 Subaru.

9 Q. How about these next three?

10 A. This a closer angle of the left front of the Subaru,
11 exhibit 117 another angle of the front of the Subaru to the
12 fender, exhibit 118. And a picture of the Idaho driver's
13 license of Vonette Larsen, exhibit 119.

14 Q. In terms of 119, where did you find that?

15 A. I found this in the purse inside the Subaru.

16 Q. Is that an accurate photograph of Mrs. Larsen's
17 driver's license that was inside the Subaru that day?

18 A. Yes, sir.

19 Q. I think I went out of order there. Why don't you do
20 the next four.

21 A. This is another angle of the same Subaru from the
22 driver's side, exhibit 113?

23 Q. I think so, it's my handwriting.

24 A. The driver's side of the Subaru, exhibit 114.

25 Another angle of the front of the Subaru of the driver's side,

1 Q. Did you take some photographs that day?

2 A. Yes, sir.

3 Q. How about these three first, what are they?

4 A. This is a picture of the front of the Honda, exhibit
5 120. Another picture of the front of the Honda, exhibit 121.
6 And a picture of the rubber bumper cover from the Honda,
7 exhibit 122.

8 Q. How about these next three here?

9 A. The front bumper cover came on the Honda, exhibit
10 123. A different angle of the same bumper, the top side
11 exhibit 124. And the hood and fender area of the same Honda,
12 124.

13 Q. And the last four?

14 A. The driver's side fender area of the Honda, 126. The
15 door area of the same Honda, 127. A different angle of the
16 Honda, 128. And this is actually going to be on the door of
17 the Honda is what this is, 129.

18 Q. 120 through 129 are accurate photographs of the
19 Honda?

20 A. Yes, sir.

21 MR. VERHAREN: Move to admit 120 through 129.

22 MS. TAYLOR: No objection, Your Honor.

23 THE COURT: 120 through 129 can be admitted.

24 Q. (By Mr. Verharen) I think you have told us that you
25 have on a number of occasions looked at the Blazer and the

1 115. And another angle of the same Subaru, 116.

2 Q. Those are all accurate photographs of the Subaru on
3 that particular day?

4 A. Yes, sir.

5 MR. VERHAREN: Move to admit 110 through 117 -- 119.

6 MS. TAYLOR: Your Honor, we would have no objection to
7 all but 119. We do have an objection to 119, request to be
8 heard later.

9 THE COURT: The other exhibits with the exception of
10 exhibit 119 will be admitted, we will discuss that during the
11 break again. That's 110 through 118 will be admitted.

12 Q. (By Mr. Verharen) Detective, at some point did you
13 arrange to have the Honda moved into an enclosed place?

14 A. I didn't arrange for it, Sergeant Maskell did.

15 Q. What was the purpose?

16 A. The defense had hired an expert --

17 MS. TAYLOR: Your Honor --

18 Q. (By Mr. Verharen) Let me ask a different question.
19 Do you recall when it was that the vehicle was moved into this
20 enclosed space?

21 A. I don't have a specific date, I don't. February.

22 Q. Where was the enclosed space at?

23 A. It's there on the property at the sheriff's

24 department where we lift it up with a hoist, we're just a
25 couple bays over to the south.

1 Honda in this case?

2 A. Yes, sir.

3 Q. Is the Blazer a more powerful vehicle than the
4 Honda?

5 MS. TAYLOR: Your Honor, I'm going to object,
6 speculation.

7 THE COURT: I think certainly some foundation should be
8 laid. Sustained.

9 Q. (By Mr. Verharen) Do you have an idea what the
10 Honda is powered by?

11 A. A gas powered engine.

12 Q. Is it powered by a V-8 engine?

13 A. No, sir.

14 Q. Do you know whether the engine in the Blazer is more
15 powerful than the engine in the Honda?

16 MS. TAYLOR: Your Honor, same objection, foundation and
17 speculation.

18 THE COURT: I think he can answer that yes or no. Go
19 ahead.

20 A. Yes.

21 Q. (By Mr. Verharen) How do you know that?

22 A. There are more cylinders is the simple answer.

23 There's more cylinders on the engine of the Chevrolet than
24 there are on the Honda.

25 MS. TAYLOR: Your Honor, I'm going to move to strike and

1 ask perhaps that we to lay a better foundation, I think he
2 said he didn't know.
3 THE COURT: I guess that's kind of a nebulous term what
4 you mean by more powerful. Certainly he you can testify to
5 certain things, horsepower, size of the engine, and so forth,
6 but I'm not sure what your question really means. I'd sustain
7 the objection.

8 Q. (By Mr. Verharen) What's the difference between a
9 V-8 engine or V-4 or V-6 engine?

10 MS. TAYLOR: Your Honor, I'm going to object as to
11 relevance, we don't have the foundation for what kind of
12 engine was in the Honda yet.

13 THE COURT: Sustained.

14 Q. (By Mr. Verharen) Do you know whether or not the
15 Blazer was higher than the Honda?

16 MS. TAYLOR: Your Honor, ask for a clarification on that
17 question. I'm not sure where he is going with that question,
18 the form of the question is the problem.

19 THE COURT: Let's be a little clearer as to what we mean
20 by higher.

21 Q. Does the Blazer, is it a taller vehicle than the
22 Honda?

23 A. Yes.

24 Q. Have you had an opportunity to, you have already
25 told us you have driven it, have you had an opportunity to

1 tall. I'm 69 inches tall. I'm about 5 feet 8 1/2 inches
2 tall. Probably down below my ear, about four inches lower
3 than the top of my head.

4 Q. So someone would be where on your face seated in the
5 Blazer at eye level?

6 A. Approximately around in here.

7 Q. You have already again told us you have been in the
8 cab of that Blazer. What kind of visibility is there when a
9 person is seated in the driver's seat in terms of the windows
10 that that vehicle has?

11 A. Good visibility. I don't recall if it has tinted
12 windows or not. But there is not a sight restriction due to
13 the windows. It's good window and good view forward and to
14 the sides.

15 Q. In a vehicle that sits that high like the Blazer, is
16 there more visibility than a vehicle that sits lower like the
17 Honda or the Subaru?

18 MS. TAYLOR: Your Honor, I'm going to object,
19 speculation.

20 COURT: I think it's more of a foundation question. I'm
21 not sure if he's established the visibility on the Honda?

22 MR. VERHAREN: Yes, sir.

23 Q. (By Mr. Verharen) Have you driven a car like that
24 Subaru before?

25 A. Something that sat at that level I have driven.

1 measure how far someone who is seated in the driver's seat of
2 that thing is from the ground?

3 A. Yes, sir.

4 Q. Can you tell us how you were able to do that?

5 A. I took a person who is approximately 5 feet 8 inches
6 tall, sat him inside the Blazer and measured from the ground
7 approximately to the same height as the person's eyes are as
8 he's looking forward in the vehicle on a level surface.

9 Q. Were you standing right outside the driver's door
10 when you did this?

11 A. Yeah, I was standing in the doorway, I had the
12 doorway open when I did it.

13 Q. And the person was seated in the driver's seat?

14 A. Yes, sir.

15 Q. You just ran this tape measure all the way from the
16 ground up to their eye level?

17 A. Yes, sir.

18 Q. What's the eye level at in terms of height?

19 MS. TAYLOR: Your Honor, I'm going to object as to
20 relevance.

21 THE COURT: Overruled.

22 A. Approximately 64 inches.

23 Q. (By Mr. Verharen) Can you stand up for the jury and
24 show us where 64 inches on your body?

25 A. When I stand, I'm approximately 5 foot 9 inches

1 Q. Have you driven a car like that Honda before?

2 A. Yes, sir.

3 Q. Can you tell us what the difference would be in
4 terms of the ability of someone driving that to see compared
5 from the Blazer to the Subaru or the Honda?

6 MS. TAYLOR: Your Honor, I'm going to object again on
7 foundation and speculation.

8 THE COURT: I'll overrule, you can answer the question.

9 A. A person sitting higher will, of course, be able to
10 see more than a person sitting lower. Less sight
11 restrictions, be able to see out farther.

12 Q. Okay. At some point in your investigation here you
13 have told us you have taken these photographs, you have looked
14 at these vehicles a number of times, gone to the scene, made
15 your own diagram. At some point did you come to a conclusion
16 based on your training and experience what took place in terms
17 of the path of the Blazer?

18 A. Yes, sir.

19 MR. VERHAREN: Judge, at this point I was going to ask to
20 kill the lights and turn the projector on. I don't know if
21 you want to take lunch or not.

22 THE COURT: Probably a good time to go ahead and break
23 for lunch. Members of the jury, we will recess for lunch, see
24 everyone back here at 1:15.

25 Again admonish you not to discuss the case among

1 yourselves nor with others, nor form or express an opinion
2 about it until it is finally submitted to you.

3 (The jury left the courtroom for lunch)

4 (WITHOUT THE JURY PRESENT)

5 THE COURT: Before we let everyone go, let's discuss
6 briefly the exhibits.

7 Exhibit 95, counsel objected to 95, and I believe
8 exhibit 119 is the driver's license of Ms. Larsen. Go ahead
9 with your objection, Miss Taylor.

10 MS. TAYLOR: Thank you, Judge. Exhibit 95, in that
11 exhibit there is what appears to be maybe a bottle that would
12 have contained alcohol at some point. I think that since the
13 prosecutor has brought up the fact of alcohol on this one, the
14 bottle being there is inflammatory to the jury. We don't know
15 when it got placed there, there's a lot of information we
16 don't know about that. I think the part that the prosecutor
17 wants to show, I think it's maybe the paint transfer that's
18 shown in other exhibits. It's not like that's the only one.
19 And I think the risk of unfair prejudice outweighs probative
20 value in that particular photograph.

21 With regard to 119, I don't see how that's relevant
22 to the issues in this case.

23 THE COURT: Let's start with exhibit 95, Mr. Verharen.

24 MR. VERHAREN: Judge, it shows the paint transfer and I
25 expect this witness to testify to the paint transfer that took

1 there.

2 MR. VERHAREN: They were inserted in there as it came
3 around. The door was closed but the paint chips got placed in
4 there as the Blazer came around the Subaru, so I think it's
5 relevant.

6 THE COURT: Does the state have any --

7 MR. VERHAREN: There is a close-up up of them. It's the
8 next photograph.

9 MS. TAYLOR: 96, Your Honor.

10 MR. VERHAREN: I don't know if it puts it in perspective
11 with the sill, the doorsill.

12 The other thing that that exhibit shows, Judge,
13 besides the paint chips, there's striations below the bottle
14 of Kahlua that you apparently have identified, and those
15 striations aren't visible in any other photographs?

16 THE COURT: What are the striations indicative of, if
17 anything, Detective?

18 WITNESS SEAN DALY: Movement and relevance to the two
19 vehicles together.

20 THE COURT: My question is if we have paint chips, which
21 obviously we have the same color point chips as on the Subaru,
22 this is not exactly a mint condition Blazer by any stretch of
23 the imagination, I imagine there may be other marks on this
24 vehicle that are attributable to this vehicle over the years.

25 How do we connect the striations that Mr. Verharen is

1 place between the Subaru and the Blazer as the Blazer going
2 around the Subaru and that it was -- I guess he's showing you.
3 I think it's relevant in that regard. In terms of that bottle
4 there, I don't know if it's possible to determine what it
5 contained, if it was alcohol or not.

6 THE COURT: Hate to give away my hand, it looks like it
7 might be something that involves Kahlua. It looks like a
8 bottle that has some kind of Kahlua label on, I don't know if
9 that's what it is or not. And then it seems to have that
10 little Surgeon General's warning information on the side of
11 it, so that would be a fair guess that Miss Taylor has here.
12 Question I have, the door is open in this photograph,
13 correct?

14 WITNESS SEAN DALY: Yes, sir.

15 THE COURT: Are we looking at paint transfer when the
16 vehicle door is open?

17 WITNESS SEAN DALY: I think what we are looking for is
18 paint chips, Your Honor.

19 THE COURT: The paint chips are only visible with the
20 door open in this fashion? I'm a little confused why the door
21 being open reflects paint chips, because I don't think the
22 testimony has been that the door was open during the
23 accident?

24 WITNESS SEAN DALY: No, just how the paint chips, we're
25 going to testify how they got there and what event got them

1 referring to?

2 WITNESS SEAN DALY: I think we're referring to these
3 striations down here, this is the same and they're the same
4 right here.

5 THE COURT: You connect those striations to some extent
6 with this incident, is that correct?

7 WITNESS SEAN DALY: Yes, sir, and there's other photos
8 with the paint transfer with the striations.

9 THE COURT: All right. Anything else on that?

10 MR. VERHAREN: No, Judge.

11 THE COURT: Do you have any evidence in terms of Kahlua
12 bottle or whatever it may be? Has an officer inventoried the
13 vehicle, are there other items that we're going to hear about
14 within the vehicle that are of any relevance that are going to
15 be offered?

16 MR. VERHAREN: Inside the vehicle, yes.

17 THE COURT: Was this bottle inventoried in some fashion?

18 MR. VERHAREN: I imagine it was, but I wasn't going to
19 bring up what it was.

20 THE COURT: Anything else, Miss Taylor?

21 MS. TAYLOR: No, Your Honor, nothing other than what's
22 already been said.

23 THE COURT: I'll sustain the objection. It looks like we
24 can get the paint transfer off of exhibit 96. The striations
25 appear to be pretty prevalent, now that Detective Daly has

1 pointed out what he's referring to. I believe the striations
2 are actually obvious on exhibit 86?
3 WITNESS SEAN DALY: Yes.
4 MR. VERHAREN: If I take a magic marker and black out the
5 Kahlua bottle, will that do it for you?
6 THE COURT: I guess I just don't know what this exhibit
7 really shows that you haven't been able to demonstrate through
8 a number of other, one thing this case has is plenty of, and
9 that is photographs.
10 MR. VERHAREN: Maybe I could lay a little more foundation
11 then, Judge.
12 Q. (By Mr. Verharen) Detective Daly, is a portion of
13 the striations here that are visible in the photograph covered
14 up by the door here?
15 A. Yes, sir.
16 Q. Can you describe that for you, please?
17 A. This is the doorsill, and if you look in this
18 photograph on exhibit 86, you don't see the penetration there
19 where it comes in together with the door.
20 Q. You're talking about this area up here?
21 A. Yes, sir.
22 Q. When you look at this one right here, 96, do the
23 striations that are apparent in 95 go all the way back?
24 A. Yes.
25 Q. The striations that are apparent in 95, are they

1 THE COURT: I suspect we could always block that out. I
2 would almost prefer not to block it out because I'm not sure
3 that a bottle that might be perceived as an empty bottle of
4 some kind of an alcoholic beverage would really be any more
5 prejudicial than some magic marker or blocked out image. It
6 would seem to me I think the exhibit certainly probably is
7 more than is needed necessarily by the state, but I'm not so
8 sure the state is not going to be able to establish to some
9 degree what may otherwise have been inventoried within the
10 vehicle. If there is any question about alcohol consumption,
11 if there is a container within the vehicle, that may have some
12 relevance in the ultimate issue here. So I think exhibit 95
13 can be admitted.
14 As far as 119, that's Miss Larsen's driver's
15 license.
16 MR. VERHAREN: It corroborates the testimony, some of
17 which we have heard in this case, more which I expect later,
18 that she was the operator of that vehicle.
19 THE COURT: I'll sustain that objection as to relevance.
20 I don't know that the driver's license really establishes who
21 was necessarily operating the vehicle. I believe she has been
22 identified in that capacity significant amount of times. I'm
23 not sure that it has any relevance, really doesn't have much
24 prejudicial impact either. I just didn't know if you were
25 going to the height and weight that was written on here, I

1 longer than the ones that are in 96?
2 A. Yes, they are.
3 Q. Why is that?
4 A. That's a bigger photo, a larger photo.
5 Q. So 95 shows the striations in their totality?
6 A. Yes.
7 Q. Without the door covering them up?
8 A. Yes.
9 THE COURT: Anything else, Miss Taylor?
10 MS. TAYLOR: Your Honor, I can't imagine why he wants to
11 emphasize how hard the Subaru hit the Blazer to make those.
12 Judge, I think you had it right. He has a lot of photos of a
13 lot of different things. The only purpose to fight for that
14 one is because of what the court has identified as Kahlua
15 bottle. There's nothing that the other photographs don't tell
16 us. The fact that the Subaru and the Blazer engaged as the
17 Blazer was trying to regain the roadway, that's already been
18 established. I don't know how much more we need to emphasize
19 that through another photograph. Yet there's plenty of others
20 to talk about. There is just no purpose for that one to come
21 in, Judge. If he really wants it in, it's probably a digital,
22 and digitals are fairly easy to crop things out of. So rather
23 than take a magic marker and draw attention to it, maybe he
24 can try to crop it out of the digital photograph and reoffer
25 it.

1 know that might be an issue.
2 MR. VERHAREN: That is a good idea, Judge, I'll offer it
3 for that, too.
4 MS. TAYLOR: Judge, I think we need more foundation that
5 the weight was the same, we all lie on that.
6 THE COURT: I think I'll sustain the objection as to the
7 relevance of that exhibit. So with that I think we're done
8 for the time being. You can step down, see you at 1:15. You
9 can come back at 1:15.
10 WITNESS SEAN DALY: Thank you, Your Honor.
11 (Lunch recess)
12 AUGUST 28, 2006, 1:15 O'CLOCK P.M.
13 (WITHOUT THE JURY PRESENT)
14 THE COURT: I believe we are back on the record in State
15 versus Ellington. I think over the lunch hour we had a couple
16 of events that have occurred. If I understand, Mr. Verharen.
17 Detective Daly's father has suddenly taken ill and he has
18 responded to the hospital and that you're prepared to go out
19 of order with a witness if that would be acceptable.
20 MR. VERHAREN: Yes, sir.
21 THE COURT: Is there any objection to that from defense
22 counsel?
23 MS. TAYLOR: No, Your Honor, thank you.
24 THE COURT: The other item is that we have one of the
25 jurors that had some contact over the weekend, I think it

1 would be best to visit with Mr. Craft before we go any
2 further. With that in mind, if we could have Trevor Craft,
3 number 16, brought forward.

4 (A juror entered the courtroom)

5 EXAMINATION OF JUROR MR. CRAFT

6 BY THE COURT:

7 Q. Good afternoon, Mr. Craft.

8 A. Hello.

9 Q. Sorry to bring you in one at a time here, but it was
10 my understanding you brought an issue up to the attention of
11 the bailiff this morning, and I thought we would explore that
12 a little bit.

13 A. Okay.

14 Q. Why don't you go ahead and tell me what you told Mr.
15 Flock?

16 A. Two things. One, I own the same truck as the
17 defendant.

18 Q. When you say the same kind of a truck?

19 A. Yeah, not that truck, but the same type of truck.

20 And the other thing is my mother-in-law is in contact with the
21 driver of the Honda on a pretty much daily basis. I just
22 wanted you guys to know that.

23 Q. What does your mother-in-law do?

24 A. She's a receptionist at a physical therapy clinic.

25 Q. The driver of the vehicle, in other words, the older

1 BY MS. TAYLOR:

2 Q. Good afternoon. Did you receive any information
3 from your mother-in-law, that maybe she communicated things
4 with you, not you communicating with her. Did she tell you
5 anything about this driver of the Honda?

6 A. No.

7 Q. I think the judge covered it, but you don't feel
8 like that's going to impede you in your ability to be fair and
9 impartial?

10 A. I'm going to try to stick to what's said. There was
11 definitely a feeling, I got a feeling from her. I'm going to
12 stick with what's said here in court.

13 Q. The feeling you got from her, is it going to be hard
14 to sit across Thanksgiving table from her if you acquit Mr.
15 Ellington at the end of this case if you find him not guilty?

16 A. Not with that relationship.

17 Q. You can be fair and impartial no matter what your
18 mother-in-law feels?

19 A. Yes.

20 MS. TAYLOR: Thank you, Judge.

21 THE COURT: Anything else? I'm sorry, did you have any
22 other questions?

23 MR. VERHAREN: No, sir.

24 THE COURT: I don't think I have any other questions for
25 you. I think we will bring the rest of our jurors in.

1 sister that we haven't heard from yet, as you understand is a
2 patient at your mom's business; is that correct?

3 A. Right.

4 Q. The bailiff indicated that your mother-in-law tried
5 to talk to you about the case over the weekend?

6 A. Right. She wasn't forcing the issue, you know how
7 that goes. I told her I can't talk about it. It's about
8 pretty much as far as it went.

9 Q. When did you become aware of that connection between
10 your mother-in-law and the driver of this vehicle?

11 A. This weekend.

12 Q. Is there anything about this relationship that
13 concerns you in terms of your ability to be a fair juror and
14 some of those things that we talked about earlier last week
15 when we selected you as a juror?

16 A. She didn't really say anything. So, no, I think I'm
17 all right.

18 Q. If I understand you correctly, you followed my
19 admonishment and didn't discuss the case?

20 A. That's correct.

21 THE COURT: I don't know if either counsel wishes to
22 address the juror.

23 MR. VERHAREN: No, I don't have any questions, Judge.

24 THE COURT: Miss Taylor, do you have any questions?

25 MS. TAYLOR: I do.

1 (JURY IS PRESENT)

2 THE COURT: Ladies and gentlemen of the jury, I think we
3 are ready to get under way. The record should reflect that
4 our jurors are all back from lunch. Over the lunch hour we
5 had something unexpected come up, and Sergeant Daly has been
6 called away so we are not going to be able to finish with his
7 testimony right now, but I think counsel has been gracious
8 enough to allow us to go out of order here and take up another
9 witness at this point.

10 With that in mind, are you ready to call that
11 witness?

12 MR. VERHAREN: Yes, sir.

13 THE COURT: All right. Go right ahead.

14 MR. VERHAREN: Thank you, Judge. Joel Larsen.

15 THE COURT: Good afternoon.

16 JOEL LARSEN: Hi.

17 THE COURT: If you will come forward and raise your right
18 hand, the clerk will administer the oath.

19 JOEL LARSEN

20 was called as a witness on behalf of the
21 State, having been first duly sworn, was
22 examined and testified as follows:

23 THE COURT: If you will step around and have a seat, and
24 as soon as you're comfortable, Mr. Verharen will have some
25 questions for you.

DIRECT EXAMINATION

1
2 BY MR. LARSEN:
3 Q. Joel, would you please say your whole name and spell
4 your last name.
5 A. Joel Rodney Larsen. L-a-r-s-e-n.
6 Q. Can you tell us where do you live, Joel?
7 A. I live in Athol.
8 Q. Can you describe for us whether or not you have any
9 property there?
10 A. I own ten acres, 11 acres and a house.
11 Q. Do you have a house there?
12 A. Yes, I do.
13 Q. What kind of house do you have there?
14 A. It's a log house.
15 Q. Can you tell us before January of this year, talking
16 about 2005, who was living there?
17 A. Me, my wife and our youngest Jamie, and Joleen.
18 Q. Jamie is how old?
19 A. She is 14.
20 Q. Joleen was living with you and your wife until when?
21 A. A month, month and a half ago.
22 Q. She just recently moved out?
23 A. She is not moved out. School is out and it's more
24 convenient for her to stay in town with her sister. She's
25 been staying there for awhile now with the summer.

1 had with Vonette over the years?
2 A. Yeah.
3 Q. At some point did you and your family move from
4 Battle Ground, Washington, or from western Washington over to
5 Idaho?
6 A. Yeah, I believe it was '89, and we have lived at the
7 same place ever since.
8 Q. In Athol?
9 A. Yeah. I grew up and lived in the same house in
10 Washington, and then ever since '89 I've been in the same
11 house here.
12 Q. Can you tell us how long Vonette was a hairdresser?
13 A. Since she was 19, her whole life out of school.
14 Q. When you guys moved to Idaho, did she continue doing
15 that?
16 A. Yes, she did.
17 Q. Where did she work?
18 A. Centre Beauty Supply across from the fairgrounds.
19 Q. How long did she work there?
20 A. I think, I'm just guessing, five or six years.
21 Q. Was that a full-time job or was it a part-time job?
22 A. It was a part-time.
23 Q. Can you tell us a little bit about what you like to
24 do in your off-time?
25 A. We do everything outdoors as far as hunting,

1 Q. You have a third daughter, what's her name?
2 A. Jovon.
3 Q. How old is Jovon?
4 A. Jovon is 21, and she has a four year old son, my
5 grandson.
6 Q. What's your grandson's name?
7 A. Zackary.
8 Q. Can you tell us where you grew up Joel?
9 A. I grew up in Battle Ground, Washington.
10 Q. Where is Battle Ground, Washington?
11 A. About 10, 15 miles out of Vancouver, northeast of
12 Vancouver, Washington.
13 Q. At some point did you develop a relationship with
14 Vonette that later turned into you two getting married?
15 A. Yeah. Summer of our junior year we started going
16 out, and then we got married in '83 after she graduated, and
17 then graduated from cosmetology school.
18 Q. So you're talking about junior in high school, is
19 that when you first got to know Vonette?
20 A. Yeah.
21 Q. So you two got married, what, about a year then
22 after high school?
23 A. Yeah, '83, we were married then.
24 Q. And your three daughters that you just told us
25 about, are all those daughters, are those children that you

1 fishing, four-wheelers, snowmobiles, cycles, hiking,
2 everything outdoors.
3 Q. Is that something that you do with your wife or not?
4 A. Yeah, she was by best friend.
5 Q. Did you ever go hunting with your wife?
6 A. Yeah. She liked to go hunting, or she liked to go
7 hiking mostly, and she didn't until the last year finally go
8 hunting with me.
9 Q. Is that something that you would do with your
10 daughters as well?
11 A. Yes, it is.
12 Q. Jovon probably hunted, she's been going with me
13 since she was five years old. Then she grew out of it, and
14 Joleen took an interest.
15 Q. Is Joleen still doing that?
16 A. Yeah.
17 Q. Do you have, as a result of your interest in
18 hunting, do you have a number of firearms?
19 MR. SCHWARTZ: Objection, leading, Your Honor, as to the
20 basis for having the interest in firearms.
21 THE COURT: I think we're still at the foundational
22 stage, I'll overrule. Continue. You can answer the question,
23 sir.
24 A. Yes, I do.
25 Q. (By Mr. Verharen) Is one of those firearms a

1 revolver, a .44 revolver?
 2 A. Yes, it is.
 3 Q. How long have you had that?
 4 A. Probably, that particular one I've had probably
 5 since '91 or so. I had one exactly like that before and it
 6 was stolen out of my pickup.
 7 Q. So for about 15 years?
 8 A. Yeah.
 9 Q. Did you buy it new?
 10 A. Yes, I did.
 11 Q. What approximately did that gun cost?
 12 A. 450 bucks.
 13 Q. Can you describe why you bought that gun?
 14 A. My very first gun was a little, my dad brought it
 15 for me, a little Ruger .44 rifle, and I bought it just because
 16 I wanted a pistol also and just keep the same caliber, same
 17 gun, and that's why I chose the .44, that was the same thing.
 18 Q. It's a stainless steel gun?
 19 A. Uh-huh. (Affirmative).
 20 Q. What does that mean?
 21 A. Shiny.
 22 Q. Does it rust out in the weather?
 23 A. Not like regular metal does.
 24 Q. Where would you typically carry that gun?
 25 A. When are you asking?

1 truck. It was during the busy season, it was real cold.
 2 Q. When was this?
 3 A. 15th of December, I believe.
 4 Q. 2005?
 5 A. Yeah.
 6 Q. Okay?
 7 A. I was freezing cold, all bundled up. I went to get
 8 out and I couldn't hold myself with my right, and at the same
 9 time I slipped. I reached back and grabbed the steering wheel
 10 right as my arm was fully extended out, and tore it off.
 11 Q. As a result of that did you have to have surgery?
 12 A. I had surgery, two days later they reattached it,
 13 the 17th.
 14 Q. After you got out of surgery, it was your left arm?
 15 A. Yeah, it was my left arm I tore my bicep off.
 16 Q. Was it essentially incapacitated?
 17 A. Oh, yeah, I couldn't do anything with it, it was in
 18 a cast and a sling.
 19 Q. How long was it in a cast for?
 20 A. At least four months.
 21 Q. When you had it in a cast, it was always in a sling?
 22 A. Uh-huh. (Affirmative).
 23 Q. And after you got the cast off, did you still wear a
 24 sling?
 25 A. No. Once I was released to take it out, first few

1 Q. Would you bring it out in the woods with you?
 2 A. Yeah, I carry it with me all the time in the woods
 3 in the off season, and usually in a fanny pack.
 4 Q. Have you instructed your daughters on how to shoot
 5 guns?
 6 A. Yeah, even from when they were young I have never
 7 hid them from them. They know what they do and how to use
 8 them. Even my grandson, he's four years old and he's not
 9 allowed to point any of his toy guns or nerf guns, nothing.
 10 He's got targets or something like that. I started them all
 11 out that way so there's no curiosity. That's the way I was
 12 raised. They know they're not to be played with. If they
 13 want to shoot them, they can shoot them anytime, and that's
 14 how was I raised and that's the way I raised all my kids.
 15 Q. In terms of your work, what do you do for a living?
 16 A. I drive truck for a rendering company.
 17 Q. How long have you been doing that?
 18 A. Almost 20 years.
 19 Q. Is that a job that is physically demanding?
 20 A. Very much so, yes.
 21 Q. At some point last year were you injured on-the-job?
 22 A. Yeah, I tore my left bicep off.
 23 Q. How did you tear your left bicep off?
 24 A. I had a shoulder injury that I was trying to baby,
 25 or however you want to say it, and I was getting out of the

1 days it was a hard cast, and then after that it was one I
 2 could take it out of, exercise it, put it back in and strap it
 3 back, it was velcroed up.
 4 Q. Let me jump back to your firearms. Did you at some
 5 point ever get a concealed weapons permit?
 6 A. Yeah.
 7 Q. When did you do that?
 8 A. Of '92.
 9 Q. And that was out of the state of Washington?
 10 A. Yes, sir.
 11 Q. And you have had that since?
 12 A. Still, yeah.
 13 Q. Were there occasions that you would ever leave one
 14 of your guns in your vehicle?
 15 A. Yeah.
 16 Q. Can you tell us that would happen?
 17 A. Until this I never spent hardly any time in town. I
 18 like outdoors, I go hiking, hunting, horn hunting, so usually
 19 I'm either at home, work or with Vonette up in the hills
 20 hiking.
 21 And one reason too is me and Vonette were stopped
 22 several times by cougars and bears, so I've just grown to
 23 always carry one.
 24 Q. How did you ever get in the position where that ever
 25 occurred?

1 A. Again I hunt a lot. Me and Vonette, early on she
2 didn't like to hunt until this last year that she wanted to.
3 So we were going back the one time, went back to take
4 pictures, I didn't have at that time anything with me other
5 than a camera. We were calling these bulls in to take
6 pictures of.

7 Q. How were you calling bulls in?

8 A. Cow calling.

9 Q. What are you talking about when you say bulls?

10 A. Bull elk, I had got my elk, and there was several,
11 they're mating, and we go back and just call them in, take
12 pictures.

13 Q. You would do the archery elk hunt?

14 A. Yeah.

15 Q. And then you'd come back later with a cow call and
16 keep bringing bulls in?

17 A. Yeah, that particular time the cougar was coming in
18 on us and came up behind us. It was archery season after I
19 got my bull, and me and her went back just to take pictures
20 because there was quite a few other ones in the area. We had
21 that cougar come running in on us. After that I never did go
22 without a gun or something. That particular time all I had was
23 a camera, and it just come run charging in. It turned and
24 left, but ever since that I always carried a gun.

25 Q. That was in response to cow calling?

1 A. Yeah.

2 Q. So you've had a lot of free time in the last several
3 months?

4 A. Yes.

5 Q. Did you at some point, your grandson Zac, did he
6 come over on New Year's Eve?

7 A. Yeah, he came over to stay with us New Year's Eve.

8 Q. What about Joleen, what happened to her?

9 A. Joleen went into Jovon's for New Year's Eve.

10 Q. They spent the night together at Hayden at Jovon's
11 house?

12 A. Yes, they did.

13 Q. What time did you go to bed that night, New Year's
14 Eve?

15 A. Probably 9, somewhere around there.

16 Q. How about your wife?

17 A. Same time. In fact we might have even have fell
18 asleep on the couch. We ws just home watching movies, fell
19 asleep. I know we woke up about, I know we woke up, that was
20 it, we fell asleep on the couch, because I remember waking up
21 about 11 or so and going to bed.

22 Q. What time did you get up the next morning New Year's
23 Day?

24 A. I always get up early. I'm sure I was up by 6,
25 probably 5 or so.

1 A. Yeah.

2 Q. Let me take you to New Year's Eve, December 31,
3 2005. That particular day can you describe what you and your
4 wife did?

5 A. New Year's Eve I would have been, that day I went
6 horn hunting.

7 Q. What do you mean by horn hunting?

8 A. Shed horns, hiking.

9 Q. Not everybody knows what you're talking about when
10 you say horn hunting, what do you mean by shed horns?

11 A. Around in December the deer start losing their
12 antlers, and I just go out, it's exercise, something to do,
13 and again I like being outdoors. I just go look for their
14 horns that fall off.

15 Q. Did you do that New Year's Eve?

16 A. New Year's Eve, yes, I did.

17 Q. I know you told us you had surgery in December just
18 before this, how long were you off work for?

19 A. I'm still off. I'm in the last stages of it. I
20 took another examination through the independent physical
21 therapist and he recommended another three weeks, three to
22 four weeks. I'm in my second week. So hopefully in two weeks
23 I'll be back to work.

24 Q. So you have been off work since December '05 until
25 now?

1 Q. Do you remember what time Vonette got up?

2 A. Probably shortly after 6 or so. 6.

3 Q. Was there a point that morning when you got a call
4 from Joleen?

5 A. Yeah, that was probably about 10:30, 11, something
6 like that, I'm guessing.

7 Q. Can you describe that for us, that call?

8 A. It was a very, she was very scared, upset, talking
9 really fast, saying that a guy had --

10 MR. SCHWARTZ: Objection, hearsay.

11 THE COURT: I think there is probably a foundational laid
12 for an exception here, I'll overrule. Continue. You can
13 answer the question, sir.

14 A. She said there was somebody that was following them
15 and stopped, got out, came back and threatened them,
16 threatened to kick their ass is what she said, hit the car
17 with their fist, and took off running back to their rig, took
18 off. And she said that they had called 911 and followed him.
19 Then she started into, she said she followed them, then he
20 tried to run them off the road. Then followed them some more,
21 and she started going on about they don't know exactly where
22 he is at. It was something about being in these four
23 driveways, three or four driveways.

24 I said where are you at? And she said something,
25 when she was talking like this I told her to calm down.

1 Actually I told her to shut up, I didn't need to hear all the
 2 details, just where are you at. And it was something about I
 3 heard Seasons Road, I heard Brunner Road and I heard Ramsey,
 4 so I wasn't exactly sure. I said okay, I'm on my way. Me and
 5 the wife got our coats and then left the house.
 6 Q. And you had Zac there still at the house?
 7 A. Yes.
 8 Q. What about Zac?
 9 A. Zackary stayed there with my youngest daughter
 10 Jamie, and we went outside and got in the car and then left.
 11 Q. Which car did you take?
 12 A. The Subaru, my wife's car.
 13 Q. What color is the Subaru?
 14 A. Burgundy.
 15 Q. About how long had you and your wife owned that
 16 vehicle?
 17 A. Maybe a couple years.
 18 Q. Is it a shift?
 19 A. Yes, five speed.
 20 Q. Is that something that you were able to drive with
 21 your left arm in a cast and in a sling?
 22 A. I eventually had to. At that time it was very
 23 hard. It was better, I just had her drive. I don't think
 24 before that that I had given it much because it's just hard to
 25 drive. Since she was going, she might as well drive it.

1 Everything we own, except one vehicle, is a stick.
 2 Q. Which one vehicle that isn't a stick?
 3 A. My pickup, it's a big pickup that is used for wood
 4 hauling and stuff like that. But all our normal everyday
 5 drivers are all five speeds.
 6 Q. Was there a gun in the car when you and Vonette got
 7 in the car?
 8 A. Yeah, I had taken it the day before when I went horn
 9 hunting.
 10 Q. Had you left it in there?
 11 A. Yes, I did. I had it in my fanny pack that had food
 12 and stuff in my fanny pack. I thought I might be going the
 13 next day, too, and I just stuck it underneath the seat like I
 14 do a lot of the times.
 15 Q. Was the gun loaded?
 16 A. Yeah.
 17 Q. Can you describe how many rounds were in it?
 18 A. There's five loads, five rounds with -- I always
 19 keep it, when I carry it, on an empty cylinder in case it gets
 20 hit, dropped or I fall it doesn't go off, it's got the empty
 21 one there.
 22 Q. Was that in the fanny pack in the car?
 23 A. No.
 24 Q. Why not?
 25 A. Because I had food in my fanny pack. Like I said, I

1 thought I would be going the next day maybe so I took it out
 2 and stuck it under the seat.
 3 Q. Which seat?
 4 A. Passenger.
 5 Q. What time do you think it was that you and your wife
 6 left your house to go see your daughters?
 7 A. Quarter to 11. It was right after Joleen called,
 8 but I'm just guessing on the time. I'm just guessing
 9 approximately what time it was.
 10 Q. Describe what happened for us, please?
 11 A. We both got in the car, left. Went out the
 12 driveway. And from what I had gathered from what Joleen had
 13 said, I thought we'd just go backwards and that way we would
 14 see them somewhere. I wasn't exactly sure where they were
 15 sitting or what they were doing. Anyway, we went out, went
 16 down Remington Road to Weir Road, turned, went down Weir
 17 Road. Again I wasn't sure where they were at, what driveways
 18 that they said he turned in. So when we went around that way,
 19 all the way down Weir road to Brunner Road. When we got up to
 20 the, it's a T, and when we came up to the T intersection at
 21 Brunner, we looked to the right and we could see the
 22 daughter's Honda, the white Honda.
 23 Q. Were they at the intersection of Brunner and Ramsey?
 24 A. We were at Brunner and Ramsey. They were at -- no,
 25 I'm sorry.

1 Q. Would it help to look at a diagram of the area?
 2 A. Yeah.
 3 Q. Let me do that for you.
 4 A. We were at Weir and Brunner. From there we could
 5 look down and see Joleen on Ramsey. Until this thing all
 6 happened I didn't even know those side roads, because it's not
 7 a way I usually go. But, yeah, I went blank there for a
 8 second trying to think. We were on Weir, came up to Brunner
 9 and you could look over and see Joleen on Ramsey.
 10 Q. Did you talk to your daughters at that point?
 11 A. After we drove over.
 12 Q. Can you show us where you talked to them? Get
 13 yourself orientated.
 14 A. Remington is up here, we came down here, and when we
 15 came right to here, we could see Jovon parked right here,
 16 there is a little substation right there. So from here we
 17 looked over here, and from here also you can see all the way
 18 down this way. This is the T we came up to going backwards
 19 from what I thought they had said what she had done.
 20 Q. And this is a big open field here?
 21 A. This is all open, this is timber. And after I
 22 talked to them -- should we go on?
 23 Q. Let me put this down, my arm is starting to hurt.
 24 How long do you think you talked to your daughters here at
 25 that location?

1 A. Probably just five minutes.

2 Q. After talking to them, did you head down to some
3 other place?

4 A. Went right back to where we had come from down
5 there. Then they told me, well, he was in, when they came
6 down here, after I talked to them they said he was in, lost
7 him here, that he couldn't have went all the way by her. So
8 when they cam up to here, they looked down here and they could
9 no longer see him. And this is all open field here, and this
10 is like a mile and a half, it's a long distance. Jovon said
11 they weren't that far behind that when they came up, he had to
12 disappear here. There's a bunch of trees, you can't see
13 anything here, and you can see all the way down here, you can
14 see all the way down to this corner.

15 Q. So where did you go then?

16 A. After they said it was one of these three, four
17 driveways where he had to be. I went back driving by these,
18 then I knew which one, I didn't know if it was some here,
19 anyway it was these here. Vonette was driving, we looked, we
20 got up to this intersection and there were some people
21 standing out there looking at some donkeys.

22 Q. What was the reason that you were looking for this
23 vehicle?

24 A. Just so that we could visually see. The police were
25 on their way. The kids said that he was back there at one of

1 Brunner towards your daughters?

2 A. After I got done talking to these people, I walked
3 back to the car and I looked down and then the officer was
4 with the kids where they were sitting there.

5 Q. You could see all the way down Brunner and you could
6 see a patrol deputy there with your two girls?

7 A. Yes.

8 Q. What did you do at that point?

9 A. At that point I got back in the car and we drove
10 back down to talk to them. Before we got there he turns
11 around and comes up to the intersection.

12 Q. The deputy did?

13 A. The deputy did. At that point we were turning by in
14 front of him. I didn't talk to him or hold him up because I
15 knew the kids had told him where he was over to the right
16 there in one of those three or four driveways.

17 Q. Did you talk a second time then to your daughters?

18 A. Yes. The officer turned left, went the other way. I
19 went up, we went on, stopped next to the kids and asked them
20 didn't you tell him he was over there? And they said, yeah,
21 dad, we did, we don't know why he went left.

22 Q. Maybe you can show us what you mean?

23 A. We came back here, the kids were sitting here. We
24 turned in front of the officer to go to the kids. The kids
25 from here pointed and showed him that he was over here in one

1 those driveways. So when we went back there we seen those
2 people, so I told Vonette, I go pull in there and let's ask
3 these.

4 Q. You're talking about the people that were at the
5 donkeys?

6 A. Yeah, had the donkeys at the corner of Weir and
7 Brunner.

8 Q. What were you going to do had you seen where this
9 Blazer was?

10 A. I was going to go tell the officers where he was
11 at. At that time he didn't know where he was at. I figured,
12 I sort of thought he was at this one particular place because
13 there is a lot of junk cars. The other places driving by you
14 could pretty much see the rigs there. There's other
15 buildings, thick trees, and obviously a lot of places that he
16 could be.

17 Q. So you talked to these two people who were by some
18 donkeys there at the intersection of Weir and Brunner?

19 A. Yes.

20 Q. They didn't know anything?

21 A. Yeah, she told me the same --

22 MS. SCHWARTZ: Objection, hearsay.

23 THE COURT: Sustained.

24 Q. (By Mr. Verharen) At some point after talking to
25 those two individuals did you and your wife drive closer on

1 of these driveways. At that point the officer turned and went
2 this way.

3 Q. So after that happened and you were talking to your
4 kids, did you and your wife then decide to go back down
5 Brunner towards Weir?

6 A. Yes, we did. We went back the direction we came
7 from, and I said, okay, let's go to the house on the other
8 side of where both me and the donkey people thought he was at.

9 Q. What happened when you got back down to that
10 location again?

11 A. We pulled in that house and I was going up, I got
12 out of the car and I went up to the house.

13 Q. Vonette still driving?

14 A. Vonette still driving. I never did get out of the
15 car. All we did was pull up next to the girls and asked them
16 if they had told him he was over there. So we turned around,
17 she turns around and we go back over there and I stopped at
18 the house on the other side of where we thought he could be.
19 I got out and I was going to walk up to the house to ask
20 permission if I could walk down their fence line and look over
21 to see if I could see the vehicle.

22 Q. Why did you want to see in that other property that
23 was down the fence line on the one you were on?

24 A. Again I could go and tell the girls, tell the
25 officer he is right there. Just get a visual, it was a gold

1 Blazer, goldish color Blazer gold and white is what I was told
2 by the girls, had no rear license plate. I had asked them
3 about the front license plate, and they said, dad, we were
4 trying to get out of the way, he forced us off the road, we
5 couldn't see let alone if he had one.

6 Q. Front license plate?

7 A. Yeah.

8 Q. What happened as you were walking up to this house
9 to get permission to go down the fence line?

10 A. Bunch of dogs came out, and at the same time a
11 vehicle started up fairly loud over in that direction. I
12 dropped down to one knee. There were pine trees in the front
13 yard that were pruned up pretty nice to where when I dropped
14 down to one knee I could look underneath and look all the way
15 over there and I seen a gold colored Blazer starting to pull
16 out from behind the stop.

17 Q. What happened after that?

18 A. Went back to the car, got in the car, and I said
19 he's over there.

20 Q. Who did you say that to?

21 A. To Vonette. We backed back out of the driveway and
22 she turned that direction. We got almost to the driveway and
23 he come flying out of the driveway. He didn't look our way
24 but he did look back to see if there was cars. As far as if
25 anybody was passing or not, he comes out of the driveway and I

1 he turned and went by the girls.

2 Q. So going south on Ramsey off of Brunner?

3 A. Yes.

4 Q. What did your two daughters do as the Blazer drove
5 past them?

6 A. They took off, they started following him.

7 Q. Did you or your wife have a cell phone with you?

8 A. No, I never owned a cell phone, neither me nor the
9 wife until this happened, after this happened.

10 Q. So you weren't able to contact your two daughters?

11 A. No.

12 Q. Describe what happened then?

13 A. We got up to the intersection there. We also turned
14 and began to follow them. Followed them all the way through
15 the corners, and then this straight stretch going down to
16 Scarcello Road.

17 Q. You were going all the way down Ramsey Road to the S
18 curves?

19 A. Yeah, south.

20 Q. How fast do you think you and your wife were going?

21 A. Probably 60 or so on these corners and probably 80
22 on the straight.

23 Q. Were you able to keep your daughter's car in sight
24 behind the Blazer?

25 A. Yeah, yes.

1 was looking, I was up in the window looking to see if I could
2 get a front license plate, and he had no front license plate
3 either.

4 Q. Can you show us on this diagram the approximate
5 place where you and your wife were and the approximate place
6 where you saw the Blazer come out of this driveway?

7 A. It's this white one right there. It would be the
8 second driveway down from Weir Road. It's in these trees.

9 Q. You mean from Brunner Road?

10 A. I'm sorry, Weir Road, it's the second driveway down
11 on Brunner.

12 Q. So after you saw that the vehicle didn't have any
13 front license plates, what happened?

14 A. The wife turned and pulled in behind where, not
15 exactly where he came out of, she pulled in the same driveway,
16 backed up. Didn't back up far enough. When she went to go
17 she was starting to go on the grass. She backed up again and
18 then we proceeded to go.

19 Q. To going behind the Blazer?

20 A. Uh-huh. (Affirmative).

21 Q. Were you able to see which way the Blazer went as it
22 went down Brunner?

23 A. Oh, yeah. Again it's wide open, you can see all the
24 way down to this corner. There is a little bit of a dip. He
25 was approximately here by the time we then got going, and then

1 Q. What was the reason that you were following your
2 daughters?

3 A. Because they were following him. I wasn't going to
4 stop and leave my daughters go.

5 Q. Was Vonette still driving?

6 A. Yes.

7 Q. What happened when you guys got close to Scarcello
8 Road?

9 A. He started slowing down to turn.

10 Q. Who is he?

11 A. Ellington.

12 Q. The Blazer?

13 A. The Blazer.

14 Q. Were you able to see what turn the Blazer took there
15 at Scarcello?

16 A. Yeah, it only goes to the right, and he turned
17 right.

18 Q. Then did your daughters do the same thing?

19 A. Yes, they did.

20 Q. So now would I be right in saying that this was the
21 left corner here that you took off of Ramsey?

22 A. The right.

23 Q. I'm sorry, the right?

24 A. Yeah, that's the right turn.

25 Q. On Ramsey can you tell us what happened? Excuse me,

1 on Scarcello can you tell us what happened?
2 A. Just continued down that. I knew that the girls
3 were on the cell phone when we first, when they first seen us,
4 seen him come out of the house where he was at and went
5 towards them, I knew that they were back on the cell phones.
6 After the fact I guess they never were off the cell phones.
7 But anyway I knew they were on the cell phones calling 911
8 again, going down the road, turned onto, I was just waiting
9 for an officer. I knew at anytime there had to be one
10 coming.

11 Q. How long was this after you saw the Blazer that it
12 was that the deputy had left, what's the time span in there?
13 In between seeing the deputy leave and then seeing the Blazer,
14 what do you think that time span was?

15 A. Maybe five minutes. Something like that. Because
16 he left, we talked to the girls a little bit, turned around,
17 went over there. Yeah, at least five minutes.

18 Q. Back on Scarcello Road, how far down Scarcello Road
19 did you travel?

20 A. Half ways. There is a little bit of a hill,
21 S corners going up, and when it peeked the top there, that's
22 where he stopped.

23 Q. Did you see him stop?

24 A. Yeah, when we came up we seen the girls, of course,
25 brake lights. I seen him that he was definitely stopping and

1 A. Yeah, the girls said that there was a car coming
2 that had --

3 MR. SCHWARTZ: Objection.

4 THE COURT: Sustained.

5 Q. (By Mr. Verharen) The Blazer is backing out after
6 turning into that driveway, where are you and your wife in
7 terms of where your girls are?

8 A. In between him and the girls. The girls stopped, we
9 went on by the girls and got between him and the girls.

10 Q. Where were your two daughters stopped?

11 A. In their lane behind us.

12 Q. What happened after you and your wife got in front
13 of your two daughters?

14 A. As we went around the girls and pulled up, we were
15 all but stopped when he came across and hit us right in the
16 front left corner.

17 Q. What do you mean all but stopped?

18 A. He had this going down. We were all but stopped.
19 We were not totally stopped but we just hadn't come up yet
20 from getting stopped.

21 Q. Your wife wasn't completely stopped when there was
22 contact between the Subaru and the Blazer?

23 A. Yes.

24 Q. How did the Blazer come around you and your wife's
25 car?

1 he had already slowed down, and then he turned into that
2 pullout, and he slid across and was turning round.

3 Q. As he was pulling into that turnoff and then turning
4 around, what did you and your wife do?

5 A. I told the wife, because it was obvious he was -- I
6 know that that wasn't a road that went anywhere, it's just a
7 driveway. It's a big farm, they have a big approach driveway
8 for tractor trailers to come in and out, farm equipment and
9 stuff, so I knew it didn't go anywhere. I knew he was going
10 to be turning around. I told the wife, I go get around the
11 girls and block him from hitting the girls, because he's
12 already threatened the girls, he ran them off the road, I
13 wanted to protect my girls.

14 Q. Let me stop you right there and I'm going to show
15 you a photograph number 5.

16 Can you describe, using this photograph, where the
17 Blazer went in terms of this driveway that you were talking
18 about?

19 A. It turned in here, went straight into here. There
20 was gravel over the top of this. When he turned in he didn't
21 get stopped probably as fast as he wanted to, and then he
22 backed back out this way.

23 Q. Backed out into the eastbound traffic?

24 A. Oncoming traffic, yeah.

25 Q. Was there oncoming traffic?

1 A. Well, it hit right at the back of the tire in front
2 of the door there.

3 Q. Which tire?

4 A. It would be the driver's side front. And it was in
5 the front of the door there is where the front driver corner
6 of our car made the hit.

7 Q. Which way was the Blazer going when there was that
8 contact between your vehicle and the Blazer?

9 A. Facing down the road. At that time it was facing
10 down the road. Do you want me to keep going?

11 Q. I just want you to describe how it went around your
12 vehicle?

13 A. Well, it backed up like this and it came around like
14 this, and we made contact like that. Instead of, if anything,
15 it should have down like this, it would have kept him away
16 from the girls.

17 MR. SCHWARTZ: Your Honor, I'm going to object as to the
18 speculation as to what should happen.

19 THE COURT: I'll sustain, just try to stick with what
20 actually occurred, sir. Continue.

21 Q. (By Mr. Verharen) After the Blazer and your wife
22 and your car hit there, what did the Blazer do?

23 A. He continued to come on around us. He went around
24 behind us.

25 Q. So when the Blazer and the Subaru hit, you and

1 Vonette were both in the front seats?
 2 A. Yes.
 3 Q. Looking straight ahead?
 4 A. Yes.
 5 Q. You could see that happen looking straight ahead?
 6 A. Yeah, because he hit us in the front.
 7 Q. So as the Blazer is coming around the driver's side
 8 part of the Subaru, were you able to see what was taking
 9 place?
 10 A. Yes.
 11 Q. How could you see that?
 12 A. Just looking out the window.
 13 Q. As the Blazer started to go down, the driver passed
 14 the side of the Subaru, could you see where it was going?
 15 A. Yes, he was continuing to go turn around us and
 16 going at the girls. He was not leaving.
 17 Q. What do you mean he was not leaving?
 18 A. The path for him, the way he was heading, he could
 19 have left, he could have went straight ahead and left. But he
 20 chose to just come around us --
 21 MR. SCHWARTZ: Your Honor, I object to him saying what
 22 Mr. Ellington chose.
 23 THE COURT: I'll sustain. He can testify what he
 24 observed, that would be fine.
 25 MR. VERHAREN: Maybe I'll stick a diagram up there for to

1 there?
 2 A. They're on this lane back behind us.
 3 Q. So in other words?
 4 A. They're in the correct lane.
 5 Q. In other words, this entire lane is completely open?
 6 A. Uh-huh. (Affirmative).
 7 THE COURT: Was that a yes or no?
 8 WITNESS JOEL LARSEN: Yes.
 9 THE COURT: We have to transcribe this.
 10 WITNESS JOEL LARSEN: Yes.
 11 Q. (By Mr. Verharen) What happened as the Blazer
 12 approached your daughter's vehicle?
 13 A. It accelerated.
 14 Q. How could you tell it was accelerating?
 15 A. It's a very loud vehicle. I could hear either -- I
 16 could hear it kick down either gears, go into a lower gear or
 17 it has a four barrel to where he just punched it.
 18 Q. Did that continue all the way from across the
 19 eastbound lane there to contact with your daughter's vehicle?
 20 A. Like he went all the way around us, it was turning
 21 around us, squared up with the girls and just punched it.
 22 Q. How were you able to see this?
 23 A. Through the front window, the side window, it's a
 24 hatchback. The last we were looking out when he made contact
 25 with the girls we are looking out the side back window and the

1 you look at, 46.
 2 MR. SCHWARTZ: Your Honor, I'm going to object to using
 3 that diagram. It's leading as he did not prepare that
 4 diagram.
 5 THE COURT: I'm sure that Mr. Verharen will have to
 6 certainly lay some foundation with the witness before the
 7 witness testifies from the diagram. So I'd sustain in that
 8 sense. Certainly counsel will need to do that.
 9 Q. (By Mr. Verharen) Were you able to see which way
 10 the Subaru went, excuse me, which way the Blazer went?
 11 A. Yeah, he went around us.
 12 Q. I think you were about to talk about a lane that was
 13 open for him to leave; is that right.
 14 MR. SCHWARTZ: Objection, leading.
 15 THE COURT: Overruled. You can answer that question,
 16 sir.
 17 A. Yes. The correct lane of travel would have been
 18 open.
 19 Q. I want to show you this diagram and I want you to
 20 point to this correct lane of travel that you're talking
 21 about, okay?
 22 A. Right here would have been the correct lane of
 23 travel the way it could have went. But it went around like
 24 this and kept turning, kept turning left.
 25 Q. How are your daughters parked in the other lane

1 back hatch. It's a big bubble back.
 2 Q. So you're turned?
 3 A. Both me and the wife are turning into each other.
 4 Q. Looking back?
 5 A. Yeah. Once it came around I was turning into her
 6 looking, and then she was probably doing the same looking,
 7 just followed it around.
 8 Q. Describe what the Blazer did as it was accelerating
 9 and then hit your daughter's vehicle?
 10 A. It jumped up on top. The front wheels came off the
 11 ground. It climbed up on top of the girls. All I could see
 12 and all I thought is this guy is smashing, smashing my kids
 13 inside this car. And then it continued, it never let up. He
 14 continued to have it floored and he's pushing my kids
 15 backwards.
 16 Q. How far back did the Blazer push your daughter's
 17 vehicle?
 18 A. 45, 48 feet, something like that, backwards.
 19 Q. What was your wife doing next as this was occurring?
 20 A. Screaming. We thought he was killing our kids. All
 21 we could see was the back of this Blazer up on top and I
 22 thought, it was all the metal crashing, my daughter's car was
 23 totaled after the fact. But that's what, I couldn't believe
 24 the Honda held up as far as it did. He kept pushing until he
 25 couldn't push any more.

1 Q. What do you mean by that?

2 A. He kept it floored until --

3 MR. SCHWARTZ: Your Honor, I'm trying to give him leeway,
4 but it's not proper for him to be stating what Mr. Ellington
5 is doing at this point. He can testify to what he observed.

6 THE COURT: I would sustain, try to keep it to what was
7 observed.

8 Q. (By Mr. Verharen) At some point did you get to see
9 who was driving that vehicle?

10 A. Yeah.

11 Q. When was that?

12 A. I seen when they came out of the driveway when he
13 first came out of the driveway on Brunner Road, I seen
14 him. I looked, no license plate and I seen him. When he hit
15 us, I'm looking at him.

16 Q. Is the person who was driving that Blazer here
17 today?

18 A. Yes, he is, he's right there.

19 Q. You need to describe what he's wearing and where
20 he's seated, please.

21 A. Green shirt, white stripes and sitting at the far
22 end of the table.

23 Q. So as Mr. Ellington struck your daughter's vehicle
24 and pushed it across the road, what did you and your wife do?

25 A. We both got out. I grabbed the gun, got out the

1 going towards the Blazer?

2 A. She was running also. I was trying to go to the
3 driver's side.

4 Q. What were you going to do when you got to the
5 driver's side of the Blazer?

6 A. Stop him.

7 Q. Could you see where your wife was going?

8 A. She was going on this side of me. She was running
9 on this side of me at that time. I figured that she was
10 probably trying to go around the front, around to get to the
11 girls.

12 Q. As you ran up to the back side of the Blazer,
13 describe what happened?

14 A. He threw it in reverse and it came down off the
15 girls. At that point it cut me off from going to, I couldn't
16 go to the driver's side.

17 Q. How come?

18 A. Because he was going to run me over. I threw my
19 hand up.

20 MR. SCHWARTZ: Object to that characterization.

21 THE COURT: Sustained.

22 Q. (By Mr. Verharen) How come you couldn't get around
23 to the driver's side of that?

24 A. We hit. I hit the back of his vehicle.

25 Q. Describe how you hit the back of his vehicle?

1 passenger side and started running back to try to help my
2 daughters.

3 Q. What was your intent at that point, after you got
4 the gun and you were running back?

5 A. I was going to stop him from killing my daughters,
6 which I thought they could have been dead. I thought he was
7 totally crushing them inside that car. It was up on top of
8 it.

9 Q. Had there been a point before in any of this
10 incident that you had taken that gun out from underneath the
11 passenger seat?

12 A. Uhn-uhn. (Negative).

13 Q. No?

14 A. No.

15 Q. Was this the first time you grabbed it and took it
16 out?

17 A. Uh-huh. (Affirmative).

18 Q. As you were going back to the Blazer, what is the
19 Blazer doing in relationship to your daughter's car?

20 A. At first it was still shoving it. Then he put it in
21 reverse and backed down off of the Honda.

22 Q. As you're running towards the Blazer, the back end
23 of the Blazer is what you're looking at; is that right?

24 A. Yeah.

25 Q. Could you see what your wife was doing as you were

1 A. I was shoving up, this arm is in this cast, this is
2 the only hand I had. I couldn't lift anything or push
3 anything, I'm really just protecting this one, too, because I
4 just had surgery. I threw this hand up.

5 Q. Is that the hand that had the gun in it?

6 A. Yes, it is.

7 Q. Describe then what happened?

8 A. Hit the back of it, which in turn tore the ligaments
9 off the top of my knuckle which I had to go in and have taken
10 care of. Anyway I was just trying not to go under the back
11 tire. I was pushing off to stay out of the way.

12 Q. How far back do you think the Blazer went after it
13 stopped ramming your daughter's car?

14 MR. SCHWARTZ: Your Honor, I object to the form of
15 question.

16 THE COURT: Overruled. You can answer the question.

17 A. It backed up just enough and turned like this to
18 come off of the girls. As soon as both wheels came off, the
19 one on the driver's side was totally off the ground up on the
20 girls' hood. When it come around like this, just enough to
21 get off the girls and to start forward motion.

22 Q. That's when he hit your fist on the back of it that
23 had the gun?

24 A. Yes.

25 Q. After that occurred can you tell us the next thing

1 that happened?

2 A. As I ran up alongside, the first thing, I, the back
3 end is all, and the back end and the back side windows were
4 tinted, you couldn't see in. The first thing I seen was
5 coming up on the passenger window was the dash. As I'm
6 getting closer coming up I can see, and there is no tinting on
7 the front window, the front door, passenger door. The first
8 thing I do is I see the dash going over. Then the first thing
9 I see of Mr. Ellington was his hand on the gearshift slamming
10 it down and accelerating.

11 Q. How do you know he was accelerating?

12 A. Because at the same time he threw that down the
13 motor took off again racing.

14 Q. Were you at this point as you have been describing
15 it, were you running up to the passenger side door of the
16 Blazer?

17 A. Yes.

18 Q. So after Mr. Ellington put this thing into gear and
19 hit the gas, what happened?

20 A. I pulled up. I had the gun pointed at him through
21 the passenger window.

22 Q. Was his vehicle moving at this point?

23 A. Starting, yes.

24 Q. Which way was it going?

25 A. Forward.

1 the time I had seen her here going out the side of my eye. At
2 that point I knew the girls were there, the wife is over here.
3 I pulled up just to split where the girls were and -- the
4 girls and my wife were, and I shot through the front fender at
5 the motor.

6 Q. So had you wanted to, could you have shot at
7 Mr. Ellington at that moment?

8 A. If I wanted to, yes, but I didn't, because of the
9 girls. But, yes, I was leveled on him.

10 Q. How far away do you think were you from him when you
11 were in a position to shoot Mr. Ellington?

12 A. I couldn't have took another step closer. I was
13 just far enough outside the window, he had the window up.

14 Q. You were afraid that you might strike your daughters
15 on the other side?

16 MR. SCHWARTZ: Objection, leading.

17 THE COURT: Sustained. Asked and answered.

18 Q. (By Mr. Verharen) at the moment that you were doing
19 this and raising the gun and Mr. Ellington was going forward,
20 and I think you stated he was looking at your wife, how far in
21 front of the Blazer was your wife?

22 A. Twenty feet?

23 Q. What was your wife doing?

24 A. She was going across the road, like I said, trying
25 to get to the girls around there.

1 Q. Go ahead and continue. You put the gun up?

2 A. I put the gun up and I had it on him, and I could
3 see the girls, all I could see was the white car on the other
4 side of him.

5 Q. You were looking at Mr. Ellington through the
6 passenger side window?

7 A. Yes.

8 Q. And you can see his profile there?

9 A. Yes.

10 Q. What's on the other side on the driver's side window
11 that you can also see as you're looking through?

12 A. Silhouette of my girl's car.

13 Q. What part of their car can you see?

14 A. It was like the roof. I assumed that it was the
15 roof, that's what I was looking, I could see a white car
16 behind him.

17 Q. What was Mr. Ellington doing as you're pointing this
18 gun as you're starting to raise the it towards him, what is he
19 doing?

20 A. Looking straight out the front window. He never
21 once looked over at me. Never once. He looked at my wife,
22 and he just stared at my wife.

23 Q. Where was your wife at this time?

24 A. Running around, at that point she was over in here.
25 She was crossing the centerline going around the girls. All

1 Q. Was she walking or was she running across the road
2 to get to her daughters?

3 A. Running.

4 Q. So why is it that you shot into the front passenger
5 side of that Blazer?

6 A. Just for some chance it might stop him from going
7 forward.

8 Q. Stop what, though?

9 A. Stop the vehicle.

10 Q. You mean the motor?

11 A. Yes.

12 Q. Did you think you might be able to stop the vehicle
13 by shooting the motor?

14 A. It was the only chance I had. That's the only thing
15 I thought I could even had a chance of doing.

16 Q. Did it work?

17 A. No.

18 Q. Can you describe what happened?

19 A. When he came off like this and I shot, the vehicle
20 was going this way, I was looking at Mr. Ellington through the
21 windows, he never looked at me, and then he was just staring
22 straight ahead at the wife, and then he just went like this
23 and he went at her. He turned left and kept turning left
24 until he struck my wife dead center, and then he turned back
25 this way, and then he went on down the road.

1 Q. What do you mean he was turning to the left right
2 before he struck your wife?

3 A. When he came off like this, he was facing this way,
4 of course. If he would have went straight again, he could
5 have left.

6 Q. Could you show us on the diagram?

7 A. He came off like this, could have went straight and
8 left. He didn't, keep turning left, and I heard a noise,
9 either was his tires or brushing down the side of the car, but
10 he turned left and kept returning left until he centered my
11 wife. My wife's head hit the hood of the truck with her hands
12 up like this. She knew, it was like she was going, she knew
13 she couldn't make it and it was like she went to go back the
14 other way to try -- he just kept turning left. She wasn't
15 going to make it. You could see she went like this, go back
16 like this and then she threw her hands up. Just ran over her.

17 Q. So how much -- could you see from your position your
18 wife at the exact time that Mr. Ellington struck her with his
19 vehicle?

20 A. Yes.

21 Q. How much of her was visible over the hood?

22 A. I could see her shoulders. I could see the top of
23 her shoulders, her neck, hands, head.

24 Q. Her hands were above her?

25 A. At the point of impact, yeah.

1 drove over the top of her shoulders and head. The best way to
2 describe it is like putting a log across the road and driving
3 over it. It was bouncing up and down. It looked like it
4 turned back this way, and the back wheel came and he had it so
5 floored she was rolling underneath, and he had it so floored
6 that when he went over the top of her again, her shoulders and
7 head, it spit her out, spit her out and swirled her around
8 like this facing the total opposite way.

9 Q. The back tires did that?

10 A. The back tire on the driver's side, the power tire,
11 just spit her out. He had it floored, he never did let up.
12 Once he threw it in gear and punched it, he never let up.

13 Q. After he got done running over your wife, was he (1)
14 still in the wrong lane of travel there?

15 A. After he came back into the correct lane and
16 continued, then left.

17 Q. How long after -- he ran over your wife in the w
18 lane of travel, is that right?

19 A. Yes.

20 Q. After he got done running over your wife, when
21 he get back in the correct lane of travel to go eastbound

22 Scarcello? How long after he got done running over her was it (1)
23 that he got back into the correct lane?

24 MR. SCHWARTZ: Object, I don't know how many times

25 Mr. Verharen needs to say ran over your wife, but it's clearly

1 Q. And her head, can you tell us whereabouts?

2 A. Right center of the hood. Her head hit right on top
3 of the hood in the center.

4 Q. When this is happening could you hear the sound of
5 Mr. Ellington's Blazer?

6 A. Totally floored. He never even let off. He turned
7 left, he kept turning left, he never let off, he just floored
8 it right over the top of my wife. I couldn't believe that
9 somebody was doing this to my family.

10 MR. SCHWARTZ: Objection, Your Honor, there is not even a
11 question at this point.

12 THE COURT: Sustained.

13 Q. (By Mr. Verharen) After you saw your wife's head
14 hit -- Mr. Larsen, if you need to take a break, let me know,
15 okay?

16 A. Go ahead.

17 Q. After you saw your wife's head hit the hood of the
18 Blazer, can you describe what you remember next seeing happen
19 to your wife?

20 A. She went straight back -- she hit, straight back
21 over like that onto the ground.

22 Q. Then what happened?

23 A. Then the next thing I seen was him going up over her
24 shoulders and head. Her head is sticking out the passenger's
25 side. I seen this much daylight underneath his wheel as he

1 just designed to inflame the jury.

2 THE COURT: Let's move on, continue.

3 A. He went left, ran over, then he came back the other
4 way into the lane, I'd say within 20 yards or so. It turned
5 back and then, back into that lane, and then he sort of came
6 back on the center of the, driver's side would have been on
7 the centerline leaving.

8 Q. So it was about 20 yards after that that he got back
9 in the right lane?

10 A. Yeah.

11 Q. What did you do after that happened, after
12 Mr. Ellington ran over your wife?

13 A. I emptied the rest of my gun at him. I was so, I
14 don't know what to explain. I was trying to hit him, but I
15 couldn't.

16 Q. What was your last sight of the Blazer?

17 A. After the last shot he was just, he was going down
18 that hill when I shot the last time and out of sight.

19 Q. Can you tell us what happened next?

20 A. I came, I went to the wife. I believe -- I was
21 still running, when he was running over her, I was running to
22 her, and I continued to run, and I went on by her. When I was
23 done shooting I walked back to her. When I went by her, I had
24 looked, I remember glancing down and I knew she was dead
25 because her eyes were, her head, her eyes were wide open and

1 her head was smashed. She had some blood coming out. When I
2 came back there was blood, six inch path half ways across the
3 road.

4 Q. Can you tell us what next happened with you and your
5 daughters?

6 A. The daughters, of course, were screaming. I could
7 hear them say that ran over my mom. I walked back, I walked by
8 the wife, looked down at her. My daughters ran up, they
9 couldn't even get close to her. The middle one, Joleen, was
10 screaming. Jovon, when she got close enough she started
11 puking. None of us could touch her. None of us.

12 Q. Why?

13 A. She was --

14 MR. SCHWARTZ: Your Honor, object as to relevance.

15 THE COURT: I'll sustain. I think we will take a break
16 at this point as well. We'll take a few minutes. Give you a
17 break, sir, you can step down.

18 Members of the jury, I'll again admonish you not to
19 discuss the case among yourselves, nor with others, nor shall
20 you form or express an opinion about it until it is finally
21 submitted to you. With that we will take a few minutes.

22 (Recess)

23 (WITHOUT THE JURY PRESENT)

24 THE COURT: I think we are ready to get under way. We
25 will bring our jury in.

1 MR. SCHWARTZ: We have a couple matters to take up.

2 THE COURT: Go ahead, Mr. Schwartz.

3 MR. SCHWARTZ: First matter I would like to ask about the
4 gun and how the court would like us to proceed on
5 cross-examination. I figured take it up now while the jury
6 was out.

7 THE COURT: I certainly don't think you're asking me how
8 to handle your case.

9 MR. SCHWARTZ: No, there was discussion about
10 Mr. Verharen allowing us to use it during cross even though it
11 hasn't been admitted, I wondered if that was going to be
12 acceptable with the court.

13 THE COURT: I trust, Sergeant Maskell, that this is
14 secured in the fashion as directed by the First District
15 rules?

16 SERGEANT MASKELL: I don't know what the First District
17 rules are, Your Honor.

18 THE COURT: It's suppose to be secured, it's not going to
19 be removed from the box.

20 SERGEANT MASKELL: It's zip tied into the box.

21 THE COURT: Those are the rules that I'm referring to.

22 If your question is, the witness certainly can
23 examine it, identify it, testify about it. I see no reason to
24 remove it, of course, from its secured containment, if that
25 answers your question or not.

1 MR. SCHWARTZ: It does, thank you, Your Honor.

2 Next, Your Honor, thing we are going to again be
3 asking for a mistrial in this case. Your Honor, during the
4 previous testimony that was just given before the break,
5 Mr. Verharen continually used the phrase ran over your wife.
6 When I started counting I had six times, but there were times
7 before that. I objected, Your Honor. Your Honor sustained the
8 objection. The immediate next question from Mr. Verharen
9 included that same exact phrase. I would note with more than
10 passing interest that when he did it, stared directly at
11 counsel table and smiled while he said it.

12 I would just note, Your Honor, that again goes
13 to the pattern of attempting to inflame the jury that
14 Mr. Verharen has shown throughout this case, Your Honor. I
15 know the court has already admonished him about it. We would
16 move for mistrial based on the cumulative error doctrine and
17 yet another example of Mr. Verharen attempting to try this
18 case on emotion and not on the facts.

19 THE COURT: Do you wish to respond, Mr. Verharen?

20 MR. VERHAREN: I think you ought to deny the motion,
21 Judge.

22 THE COURT: I'm not sure that I can make a record on
23 precisely everything you have articulated here, Mr. Schwartz.
24 I asked counsel to move along. I think we are heading along
25 in that direction. Unfortunately, s I think I have commented

1 before, the nature of this case is highly unusual because it
2 does involve the death of Miss Larsen that occurred in
3 the visual presence of three of her closest loved ones,
4 Mr. Larsen included. It was also audiotaped on the 911 tape.

5 And so I think the facts of this case, regardless of
6 what kind of responsibility may or may not be attributable to
7 Mr. Ellington, eventually are quite chilling, and I think it's
8 difficult to avoid that and still tell the story to the jury
9 at the same time. Certainly the incident needs to be
10 presented to the jury. It does not need to be unduly belabored
11 and I trust that counsel will move on from that point.

12 But I think beyond that I'll deny the motion for
13 mistrial at this point. Anything else, Mr. Schwartz?

14 MR. SCHWARTZ: No, Your Honor, thank you.

15 THE COURT: Anything else, Mr. Verharen?

16 MR. VERHAREN: No, Judge.

17 THE COURT: Mr. Schwartz, I'm having the bailiff open the
18 box. And of course your request I would certainly suspect,
19 would waive some chain of custody issues if you might have
20 them.

21 MR. SCHWARTZ: (Nodded affirmatively).

22 THE COURT: It looks like it's certainly properly
23 secured. We have the exhibit marked and now it's open.

24 MR. SCHWARTZ: Thank you, Your Honor.

25 THE COURT: With that let's bring our jury in.

1 (Concludes without the jury present)

2 (JURY IS PRESENT)

3 THE COURT: I think we are ready to get under way. I
4 think you still have some questions for your witness. Go
5 ahead, Mr. Verharen.

6 MR. VERHAREN: Thank you, Judge. First of all, I'm going
7 to move to admit, based on stipulation, Plaintiff's 149, the
8 gun used in this matter.

9 MR. SCHWARTZ: No objection.

10 THE COURT: 149 can be admitted.

11 DIRECT EXAMINATION (cont'd)

12 BY MR. VERHAREN:

13 Q. Joel, I want to show you what has been marked as
14 146A. I want you to take a moment and look at that diagram.
15 Give you a pen and I want you to write down, to the best
16 of your memory, where you remember your wife being hit by
17 Mr. Ellington, and then put your name by that.

18 Can you write your name by that?

19 A. I initialed it.

20 Q. Right there?

21 A. Yes.

22 Q. Your initials are where you remember her being?

23 A. I x'd it.

24 Q. Right underneath, all right.

25 How long do you think it was after this occurred

1 A. Yes, we were. When that first officer came, I tried

2 to get him to go back. But then another person came, and then
3 they separated us and they had us away from each other, and
4 then after --

5 Q. You mean separated you from your daughters?

6 A. Yes. I had to stand in different areas with
7 different officers. Then I'd say it was 45 minutes later
8 then, I'm guessing, it was quite awhile, there was a
9 tremendous amount of people there then, and then we went in
10 separate rigs to Rathdrum.

11 Q. How did you get to Rathdrum Police department?

12 A. I was with a ISP officer.

13 Q. What happened at the Rathdrum Police department?

14 A. They put us in different rooms and then questioned
15 us there.

16 Q. At some point several days later did you talk to
17 another detective?

18 A. Mr. Maskell.

19 Q. Let me jump back to the incident location. At some
20 point after your wife was killed, did you get back in the car,
21 back in the Subaru?

22 A. Yeah. When the officer arrived I had thought that
23 he had to pass at that point. I thought that he had to have
24 passed Ellington going the other way down Scarcello. He went
25 back that same direction.

1 that law enforcement got there?

2 A. Maybe five minutes, three to five minutes.

3 Q. Can you tell us what was happening during that time
4 span?

5 A. After I ended what I was talking about before, got
6 the girls, we walked back away from Vonette towards the
7 Subaru. I walked back to the Subaru. On the way there there
8 was a lady in a van pulled up with some kids in it. And I
9 felt sorry for her because she was screaming at the top of her
10 lungs and scared to death, scared of what she's seeing and I
11 can only imagine what she thought. She couldn't get turned
12 around fast enough to get out of there. Vonette was laying on
13 the road.

14 I was walking up with the girls and I had that gun.
15 I walked back then to the car. She left. I put the gun back
16 where it was under the passenger seat, shut the door. Walked
17 back to the girls, and we then walked towards Vonette again,
18 and then that was when the officer came up over the hill in
19 the direction that he went down. So three minutes, five
20 minutes, something.

21 Q. Did you and your daughters stay there for awhile as
22 more law enforcement got there and ambulances got there?

23 A. Yes, we did.

24 Q. At some point were you taken to the Rathdrum Police
25 department?

1 MR. SCHWARTZ: Your Honor, I'm going to object at this
2 point, I think it's nonresponsive.

3 THE COURT: Sustained. I don't think the question
4 asked you why right now, just asked you what you did. Try
5 again, Mr. Verharen.

6 Q. (By Mr. Verharen) and so then I take it that you
7 were frustrated that the deputy wasn't going looking for Mr.
8 Ellington, is that it?

9 A. Yes. I had asked him to go back that direction that
10 he had to have seen him. Yes, I was. Then I turned around
11 and --

12 MR. SCHWARTZ: Objection, nonresponsive.

13 THE COURT: Again I think we are off course on your
14 question here. I'll sustain, Mr. Verharen.

15 Q. (By Mr. Verharen) At some point then after the
16 deputy got there, did you get back in the Subaru?

17 A. Yes, I did.

18 Q. Can you tell us why you did that?

19 A. I was going to go -- I was going to go get in the
20 car and go again. He didn't, the officer didn't see him,
21 didn't go after him.

22 MR. SCHWARTZ: Objection, not responsive, Your Honor.

23 THE COURT: I think he has answered the question.

24 Q. (By Mr. Verharen) Do you know whether or not you
25 actually moved the Subaru when you got back in it?

1 A. If it was, it was just very minimal, a foot. I just
 2 got in, started it, and the two people that were there, the
 3 officer and the other guy out of uniform opened the door. I
 4 basically just started it up and then they told me to get out.
 5 Q. So you're not sure whether or not you moved it?
 6 MR. SCHWARTZ: Objection, asked and answered.
 7 THE COURT: Overruled, you can answer the question.
 8 A. I may have moved it, but just a foot, if I moved it
 9 any at all. I don't remember.
 10 Q. What was your emotional condition at that time?
 11 A. I don't know how to explain it, I was a wreck.
 12 MR. VERHAREN: No further questions.
 13 THE COURT: Cross-examination, Mr. Schwartz.
 14 MR. SCHWARTZ: Thank you, Your Honor.
 15 CROSS-EXAMINATION
 16 BY MR. SCHWARTZ:
 17 Q. Good afternoon, Mr. Larsen. I want to start by
 18 taking about your arm injuries. Which arm was it that you had
 19 the surgery on on the 17th of December?
 20 A. My left.
 21 Q. What was the problem with that arm?
 22 A. Tore my bicep completely off.
 23 Q. I think you also testified that you were having
 24 problems with your right arm?
 25 A. Yeah.

1 Q. What were those problems?
 2 A. It was sore, extremely sore. I had hurt it also at
 3 work. Over the course of a night it would feel better. I
 4 should say by morning it would feel better. We were
 5 short-handed at work and I just kept working.
 6 Q. When exactly did you stop working, I think you
 7 testified that you weren't working since December?
 8 A. When I ripped my bicep off on, I think it was the
 9 15th.
 10 Q. That prevented you from working?
 11 A. Yeah.
 12 Q. But it didn't prevent you from going horn hunting?
 13 A. No, it was just my arm. I could still, I did it for
 14 exercise.
 15 Q. As to the night of this incident or day of this
 16 incident, the night before New Year's Eve had you been
 17 drinking?
 18 A. All afternoon and evening I drank five or six beers.
 19 Q. And then you woke up at around six o'clock, five
 20 o'clock, I think you said?
 21 A. Yes.
 22 Q. Did you have any drinks that morning?
 23 A. No.
 24 Q. You get the phone call from your daughters. Could
 25 you describe for us again what their demeanor was like, the

1 daughter you were on the phone with, what her demeanor was
 2 like on the phone?
 3 A. She was excited, scared.
 4 Q. I think you testified that she was talking a mile a
 5 minute?
 6 A. Yeah, she talks real fast.
 7 Q. So was it kind of hard to get the information out of
 8 her?
 9 A. No, it was flowing fast, she talks really fast.
 10 Basically I didn't need to hear every detail is what I was
 11 meaning. I just wanted the basics of where she was directly
 12 at and where her and her sister approximately were.
 13 Q. But she was pretty upset?
 14 A. Yeah.
 15 Q. And I assume that that made you upset?
 16 A. She was scared and she was -- she wanted us there, I
 17 guess.
 18 Q. Maybe I didn't ask it right. I assume that hearing
 19 your daughter upset made you upset?
 20 A. Yeah, I wasn't extremely upset. I just wanted to go
 21 to my daughters.
 22 Q. Upset enough it you needed to get in your car and go
 23 there immediately?
 24 A. Yes.
 25 Q. And she told that you she had been talking to the

1 police?
 2 A. On the phone, yes.
 3 Q. You still felt the need to go there yourself?
 4 A. They're my daughters, yes.
 5 Q. Did your daughters tell you that the police wanted
 6 them to chase this vehicle?
 7 A. No. I don't know when it was I heard that -- could
 8 you ask that again, I'm sorry.
 9 Q. Did your daughter tell you that the police had told
 10 her and her sister to chase this vehicle?
 11 A. I had heard somewhere in there that they were
 12 talking with them and they were following them, and they had
 13 told 911 that they were following them, and that they had said
 14 to stay a safe distance back. I had heard that. It couldn't
 15 have been on the phone, it was probably when one of the times
 16 that I had met with them there.
 17 Q. Let me ask it this way. Were you under the
 18 impression that the police had told your daughters to follow
 19 this vehicle?
 20 A. When she first called?
 21 Q. Yes.
 22 A. No, I don't believe so.
 23 Q. Did your daughters ask you to come to the scene?
 24 A. I don't believe so. I asked her where they're at,
 25 and I might have just said I'm on my way.

1 Q. So you and your wife go out and you get in the red
 2 Subaru?
 3 A. Yeah.
 4 Q. And the gun was in the car at that time?
 5 A. Yes.
 6 Q. Did you know at that moment that the gun was in the
 7 car?
 8 A. Yeah, I left it there the day before.
 9 Q. Did you think about that as you were getting in the
 10 car?
 11 A. No, it's not a -- no.
 12 Q. So you got in a car that you knew had the gun in it?
 13 A. It's not, yeah, it's not uncommon thing for me to
 14 have guns in the rig. I have, probably 80 percent of the
 15 time, I have guns in the rig.
 16 Q. I guess what I'm getting at is when you got in that
 17 car you knew that the .44 caliber was under the seat?
 18 A. I got in that rig because it was our closest one.
 19 It was one right outside the door. It was parked behind the
 20 other ones. It was just the most convenient rig to get in at
 21 that time.
 22 Q. But besides being the most convenient rig, you knew
 23 that it had a gun in it?
 24 A. I left it there, yes.
 25 MR. SCHWARTZ: Your Honor, may I approach, Your Honor?

1 THE COURT: That would be fine.
 2 Q.(By Mr. Schwartz) Mr. Larsen, I'm going to hand you
 3 what's been labeled State's exhibit 149, if you could look at
 4 that for me. Do you recognize that?
 5 A. Looks like my gun.
 6 Q. How do you recognize it as your gun?
 7 A. It's silver, it's got a black handle, and it has
 8 wear looking like mine.
 9 Q. If you could just pick it up in the box for a second
 10 and estimate how heavy you think that gun is?
 11 MR. VERHAREN: Objection, relevance.
 12 MR. SCHWARTZ: Foundational, Your Honor.
 13 THE COURT: Go ahead, you can answer the question.
 14 A. I think it's about four pounds.
 15 Q. It's about four pounds?
 16 A. Three, four, yeah.
 17 Q. While you had this injury did you have any trouble
 18 lifting that gun?
 19 A. No.
 20 Q. And that's the gun that was in the car when you went
 21 to find your daughters.
 22 MR. VERHAREN: Objection, asked and answered.
 23 THE COURT: Sustained.
 24 Q. (By Mr. Schwartz) So how fast would you say you and
 25 your wife drove to find your daughters?

1 A. I'd say 40 miles an hour.
 2 Q. 40 miles an hour? What was your demeanor like
 3 during that part of the drive?
 4 A. I was just -- like I said, we weren't quite sure,
 5 like I said before, I wasn't quite sure exactly where they
 6 were, that's why I went the back way. We were just looking
 7 for the kids, to be with the kids.
 8 Q. Would it be fair to say you were a little anxious to
 9 find them?
 10 A. Yeah, that's what we was going, that was our reason
 11 to go be with the kids.
 12 Q. And you were pretty upset that this was happening to
 13 your daughters?
 14 A. No, I wasn't pretty upset, I was just wanting to
 15 be -- I'm sure I was upset. A guy trying to --
 16 Q. And what was your wife's demeanor while you were
 17 driving?
 18 A. We didn't talk much. She had given us a description
 19 of the rig and so we were basically just driving, we weren't
 20 driving fast. We were just driving and looking for, keeping
 21 an eye out for that vehicle since I didn't know exactly where
 22 the kids meant that it was disappeared into, in what driveway.
 23 So I went total backwards from what I thought they told me.
 24 Q. So you get to Ramsey Road and you can see up over
 25 the open field, you can see where your daughters are parked?

1 A. I got to Brunner Road.
 2 Q. Sorry, Brunner. And then you drove up and talked to
 3 your daughters?
 4 A. Yes.
 5 Q. How much time would you say had past since your got
 6 the phone call to when you arrived to talk to your daughters?
 7 A. Ten, 15 minutes.
 8 Q. And then I think you testified that you talked to
 9 your daughters for about five minutes?
 10 A. Uh-huh. (Affirmative).
 11 Q. So 15 to 20 minutes had past since the phone call to
 12 when you were done talking to your daughters?
 13 A. Yeah, 15 minutes, yeah.
 14 Q. And when you talked to them at the corner there,
 15 they weren't in any danger at that moment?
 16 A. No.
 17 Q. And you weren't in any danger at that moment?
 18 A. No.
 19 Q. Did your daughters inform you of how fast they had
 20 been chasing this vehicle?
 21 A. No. When they had said -- they were following them
 22 down there down Brunner, down Weir, when he turned around and
 23 ran them off the road, forced them off the road, he came back
 24 to Weir and turned left. At that time they explained to me --
 25 MR. SCHWARTZ: I'm going to object as nonresponsive. My

1 question was how fast they were driving.

2 THE COURT: I think he's answered the question.

3 A. I was just getting --

4 Q. (By Mr. Schwartz) The answer was no, they didn't
5 tell you?

6 THE COURT: The question was if you knew how fast. Go
7 ahead.

8 Q. (By Mr. Schwartz) So they didn't tell you how fast
9 they were driving?

10 A. No.

11 Q. Miles per hour, no.

12 Q. Once you were on the corner with them and they
13 weren't in any more danger, did you tell them to go home?

14 A. No.

15 Q. Did you tell them that it was a bad idea to have a
16 high speed chase on back roads with someone they didn't know?

17 A. No.

18 Q. Did you think it was a bad idea for them to have a
19 high speed chase with a vehicle they didn't know?

20 A. They were talking to law enforcement on the phone at
21 the time. They were just following him.

22 Q. You testified here that you went to the scene
23 because you were concerned for your daughters.

24 MR. VERHAREN: Objection, asked and answered.

25 THE COURT: It has been asked and answered. Sustained.

1 answered me. And I asked if they had seen the vehicle. They
2 said no. But she told me, she goes if it's anywhere, it's
3 probably right next door.

4 Q. But you weren't agitated when you were talking to
5 them?

6 A. No more than she was after I said, after I asked,
7 she said it's probably right there.

8 Q. While you're investigating where this car went, were
9 you starting to get excited?

10 A. Not at all.

11 Q. So you're just completely calm?

12 A. Yeah, I didn't have, I was just looking if I could
13 see this vehicle.

14 Q. And then you end up, you decide you're going to walk
15 and ask a property owner if you can walk down the fence line?

16 A. Later on, yes.

17 Q. You're right, I'm skipping a step. You see the
18 police officer talking to your daughters?

19 A. Yes.

20 Q. And you start to drive towards them?

21 A. The wife, yes.

22 Q. And then you see the officer go the other direction?

23 A. After we turned, yes.

24 Q. And you stopped and talked to your daughters again
25 after the police officer had left?

1 Q. (By Mr. Schwartz) Did that concern for your
2 daughters prompt you to tell them not to chase this vehicle
3 anymore?

4 A. I didn't think of saying anything. Like you said, I
5 didn't think it was going to be any danger. I didn't say
6 anything to them as far as that.

7 Q. At the corner?

8 A. At that corner where they were stopped.

9 Q. What about when you first talked to them on the
10 phone, did you tell them to stop chasing this vehicle?

11 A. They weren't chasing him, they were parked.

12 Q. So then once you talked to them on the corner you
13 decide that you're going to go looking for this vehicle?

14 A. Yes.

15 Q. So you start investigating, you start driving around
16 the area where your daughters have described this vehicle
17 went?

18 A. Where they had last seen him, yes, I drove. The
19 wife was driving, I was passenger, we went back over there.

20 Q. And one of the things you did was talk to some
21 people that, I believe, you said were looking at donkeys?

22 A. Yes.

23 Q. What was your demeanor like while you were speaking
24 to them?

25 A. It was fine, I was just talk talking to them. She

1 A. Yes.

2 Q. Once they described to you what happened, were you
3 angry with the police officer?

4 A. No, I couldn't believe it. And I said didn't you
5 tell him he was over there? They said, yes, dad, we did. I
6 just couldn't believe he went the other way.

7 Q. So it would be fair to say that you got a little
8 angry that the officer did that?

9 A. From, yes, from being not angry at all, yes, I
10 couldn't believe that he went the other way.

11 Q. And in fact you believe that the officer abandoned
12 your family at that point?

13 A. He wasn't with us, yes.

14 Q. And based on your feelings about that situation, you
15 have filed a multi-million dollar tort claim against the
16 county and that deputy in specific?

17 A. Not because of that. Not only because of that. My
18 daughter's car was totaled is the reason why I had to get a
19 lawyer, her insurance was wanting her to pay through this
20 whole court thing. She's had to have back surgery. Insurance
21 has run out on that.

22 Q. But the basis of that claim that you filed is that
23 you feel that the Kootenai County Sheriff's department
24 abandoned your family?

25 A. That's just part.

1 Q. So now you're a little upset that the police officer
2 has gone the wrong direction and you go to investigate further
3 where this car may have gone?
4 A. I was going to get visual contact of where both me
5 and this lady and the guy with the donkeys thought he was.
6 Q. So your wife and you proceed down to this driveway
7 and you get out of the car?
8 A. Yes.
9 Q. You're going to go ask the property owner if you can
10 walk down the fence line?
11 A. Yes.
12 Q. How are you feeling at that moment?
13 A. I was fine then.
14 Q. Was your adrenaline pumping, were you in the heat of
15 an investigation?
16 A. No.
17 Q. Did you want to find that guy?
18 A. Of course I wanted to find him, I wanted to see
19 where he was at so I could tell the officers, and go back to
20 the daughters to tell him to get back that he's right there.
21 Like I said, for some reason he must have thought, I don't
22 know why, he went the other way. But my daughters had told
23 him that he was over there. So I wanted to visually see that
24 he was.
25 Q. And then you hear an engine start?

1 A. Yes.
2 Q. And how did that, did that make your heart stop when
3 you heard that engine start?
4 A. No.
5 Q. Did you think it was him when you heard that engine
6 start?
7 A. I assumed it was, yes, when I heard it.
8 Q. And you dropped down on one knee and started looking
9 around for the car, right?
10 A. Yes.
11 Q. How did you feel right then?
12 A. How did I feel?
13 Q. Yes.
14 A. Felt the same, I was looking for him. As soon as I
15 did it, I seen him.
16 Q. You didn't get excited that you had found him?
17 A. Oh, yeah.
18 Q. Did that get your adrenaline like rushing?
19 A. There he is.
20 Q. What did you do, run back to your car?
21 A. Went back to the car and got in.
22 Q. How fast would you say you moved to your car?
23 A. What do you mean by how fast?
24 Q. Did you run, did you walk?
25 A. I ran.

1 Q. What did you tell your wife when you got there?
2 A. I said I just heard him. I just seen him, he's over
3 there.
4 Q. Was it calm like that or were you excited?
5 A. Wasn't calm like that, no.
6 Q. You were excited?
7 A. There he is.
8 Q. And so at this point the Blazer hadn't come down the
9 driveway yet, right?
10 A. It was heading out. When I seen it driving out,
11 starting to drive out from where it was hiding.
12 Q. But you managed to run to your car faster than the
13 Blazer could drive out that driveway?
14 A. Yes, I don't know if he stopped. I don't know what
15 happened between the time that I seen him, because I never
16 seen him again until we were out.
17 Q. But what I'm trying to get at, you get to your car,
18 you're inside the Subaru once the Blazer finally gets to the
19 road?
20 A. Were we in our Subaru when the Blazer got to the
21 road, yes.
22 Q. Did you attempt to block the Blazer from getting out
23 of the driveway?
24 A. No. The wife -- when he pulled out, like I say we
25 pulled in right behind him, he never stopped, he never slowed

1 down, he just came right out of the driveway.
2 Q. Right when he gets out of the driveway you're right
3 behind him?
4 A. We pulled in the driveway behind him.
5 Q. Just start following him?
6 A. And then she looked up. Like I said before she
7 pulled ahead, didn't back up far enough, it was starting to go
8 on the grass, so she backed up again and then we left.
9 Q. Once she didn't quite make the turn right, did you
10 get excited and say hurry up, I've got to catch him?
11 A. No, I said it's just grass is what I said.
12 Q. Why did you say that?
13 A. It was just grass, I don't know why she backed up.
14 Q. You wanted to get going, right, you wanted to catch
15 him?
16 A. We wanted to follow him, yes.
17 Q. So he proceeds up and takes a right basically right
18 next to where your daughters are parked, correct?
19 A. Takes a left.
20 Q. A left, sorry, a left. And how did that make you
21 feel?
22 A. Didn't make me feel any difference. There he is. I
23 knew the kids had already been on the cell phone.
24 Q. With all this concern you had expressed for your
25 daughters' safety, you didn't get more excited when you saw

1 this vehicle heading back to where they were?
 2 A. I probably did, yes.
 3 Q. So did you?
 4 A. Yes.
 5 Q. And then you and your wife in your Subaru, and your
 6 daughters in their Honda, start chasing Mr. Ellington again?
 7 A. Started following him, yes.
 8 Q. Following him at what speed?
 9 A. Like I said before, we were doing, after that we got
 10 up to 60 miles an hour, I'm guessing, in the corners, and I'm
 11 guessing, like I said I wasn't driving, on the straightaway
 12 was probably doing 80.
 13 Q. What's the speed limit out on those roads?
 14 A. 50.
 15 Q. At some points you're going 30 miles an hour over
 16 the speed limit?
 17 A. Yes.
 18 Q. Were you concerned for your family's safety doing
 19 those kind of speeds on those roads?
 20 A. I didn't have no choice, the daughters are in front
 21 of us.
 22 Q. So how are you feeling at that moment, are you
 23 getting more upset now, because now you're going this speed
 24 and that's not very safe?
 25 A. I didn't get any more upset, no. Like I said, I

1 that time did you tell your wife to try to pass your
 2 daughters?
 3 A. No.
 4 Q. Why not?
 5 A. I didn't.
 6 Q. So you take the corner at 25, 30 miles an hour and
 7 up the road you can see the Blazer starting to turn around,
 8 correct?
 9 A. That's quite a ways down the road.
 10 Q. Eventually you see the Blazer start to turn around?
 11 A. Yes.
 12 Q. And you tell your wife to get around the girls and
 13 block him in, correct?
 14 A. I told her to get around the girls and block him
 15 from hitting the girls.
 16 Q. So that put your car in the eastbound lane of
 17 Scarcello?
 18 A. Yes, when we went by the girls when they were
 19 stopped.
 20 Q. How far away from the Blazer was it that your
 21 vehicle did that maneuver?
 22 A. I'm just guessing. From where the girls were to
 23 where the Blazer was at, turned around?
 24 Q. How far would you estimate that was?
 25 A. 40 yards.

1 knew at anytime the girls were on the cell phones and that
 2 there would be an officer coming.
 3 Q. While you're driving at this speeds did you attempt
 4 to signal your daughters, did you honk your horn or flash your
 5 lights at them?
 6 A. I wasn't driving and I don't think she was, no.
 7 Q. Did you tell your wife to honk the horn or flash
 8 your lights at your daughters?
 9 A. Surely wouldn't hear no horn and, no, I did not.
 10 Q. At that point during that chase how important was it
 11 to you to catch this Blazer?
 12 A. I don't know how you --
 13 Q. Ask it this way. It was more important to catch him
 14 than it was to stop chasing him?
 15 A. My daughters were in front. We were doing nothing
 16 but following. I mean, I had no control.
 17 Q. So you get to the corner on Scarcello. How fast did
 18 your vehicle take that turn?
 19 A. We had slowed way down. We never, from what I
 20 remember we were still, we were in our lane. 25. We didn't
 21 squeal tires going around the corner if that's what you're
 22 getting at.
 23 Q. If you could just estimate the speed?
 24 A. I did, 25.
 25 Q. I'm sorry, I didn't hear that. At any point during

1 Q. So 120 feet?
 2 A. 35 yards, something like that, I'm guessing, yes.
 3 Q. How far past the girls' car did you go?
 4 A. Until to where he was at. I'm guessing, say three
 5 car lengths or so. Until, I mean, that was all behind us. I
 6 was looking at him.
 7 Q. Why didn't you tell your wife to stop the car once
 8 you were past your girls' car?
 9 A. I told her to go around the girls and block him from
 10 hitting the girls, so she did. She went around the girls, she
 11 went like this, and then right before we got stopped that's
 12 when he hit us and we made contact, and she's driving.
 13 Q. And there's still approximately 40 yards between
 14 your daughter's car and where Mr. Ellington's Blazer is?
 15 A. Not by then, no.
 16 Q. The initial contact between the Subaru and the
 17 Blazer, I think you just testified that he hit you?
 18 A. We were all but stopped.
 19 Q. So your car is still moving when the contact with
 20 the Blazer happens?
 21 A. Very little, yes.
 22 Q. And the front driver's side of your subaru hits
 23 basically around the driver's side door of the Blazer?
 24 A. Front of the driver's side door, yes.
 25 Q. So essentially your car T-boned Mr. Ellington's

1 Blazer?

2 A. No, it was in front of center. Like the back, we
3 hit right at the back of the tire and the door, right in there
4 from what I can remember.

5 Q. So your car that's still moving came into contact
6 with the side of Mr. Ellington's car?

7 A. Yes.

8 Q. But it's your testimony that he ran into you?

9 A. Yes, because we were all but stopped. Like I said,
10 it was like this, and we hadn't came back up, from when you
11 stop a car your head goes down and that comes back like this.
12 I honestly don't think we were totally stopped. But it was
13 all but coming back like this and then it hit.

14 Q. Maybe I'm just not understanding you. Could you
15 explain to us why you would characterize Mr. Ellington's car
16 having struck your car when it was the front of your moving
17 vehicle that ran into the side of his vehicle?

18 A. Because he was turning left.

19 Q. So it's your testimony that the Blazer slammed the
20 driver's side area of that car into the front of your car?

21 MR. VERHAREN: Objection, that isn't his testimony.

22 THE COURT: Sustained. Rephrase the question.

23 Q. (By Mr. Schwartz) So describe to us how that
24 contact occurred?

25 MR. VERHAREN: Objection, asked and answered.

1 Q. So that break and the throttle that you're

2 describing, that occurred between the contact between the
3 Subaru and the Blazer?

4 A. Yeah.

5 Q. So the Blazer goes across the road and makes contact
6 with the Honda?

7 A. Yes.

8 Q. And it's your testimony that they were dead on head
9 to head?

10 A. No, I didn't say that.

11 Q. So describe how they came into contact with each
12 other?

13 A. When he came around us, he turned back left. Of
14 course he came all around us. He sort of squared up a little
15 bit and then punched it totally. He had the gas -- he had it
16 floored here, he let off a little bit, came around us and then
17 floored it again. When they hit, they weren't square, they
18 were off like this.

19 Q. It's your testimony that the front tires of the
20 Blazer were up on the hood of the Honda?

21 A. Yes.

22 Q. Would it surprise you that your daughter's testimony
23 was that the wheels were not on the hood of the car?

24 A. The left one was totally on the hood. The right one
25 could have been just touching the ground. I know the left

1 THE COURT: Sustained.

2 Q. (By Mr. Schwartz) After your vehicle made contact
3 with the Blazer, that impact moved the Blazer, correct?

4 A. No. All it pretty much did was just block him.
5 There wasn't a lot of contact. Like I said, we just, as far
6 as moving it, no.

7 Q. So the contact didn't cause any shift in the Blazer
8 trajectory?

9 A. If any it would have shifted to the right.

10 Q. And did that contact stop the Subaru?

11 A. Like I said, we were all but stopped and we were
12 stopped, yes.

13 Q. So the contact itself stopped the vehicle?

14 A. Because we were almost stopped, yes.

15 Q. And you testified that you could hear the sound of
16 the Blazer accelerating at that point?

17 A. Yes, it accelerated hard. It let off, and then
18 after the contact then it accelerated again.

19 Q. So it's your testimony now that the acceleration
20 ended while the contact was happening?

21 A. Like I had said before, after the contact he got
22 squared up with the girls and then he totally punched it. So
23 there was a brake from full on throttle. From here full on
24 throttle, there was a break, and then full on throttle again
25 after he went around us.

1 one, it went up on the hood. The left tire was totally on the
2 hood.

3 Q. I'll ask you again. Would it surprise you that your
4 daughter testified that the wheels were not on the hood of the
5 Honda?

6 A. The wheels were on. If that's what she said, yes,
7 because the wheels were on top. The driver's side wheel was
8 most definitely on top of the Honda.

9 Q. So your daughter who was in the Honda would be
10 mistaken about what happened when the Honda was hit.

11 MR. VERHAREN: Judge, I'm going to object, lack of
12 foundation. As I recall, Joleen testified she couldn't see
13 anything because the airbags went off.

14 THE COURT: I'm not sure which daughter he's referring to
15 and which testimony, so I would sustain. It's argumentative
16 nonetheless.

17 Q. (By Mr. Schwartz) How long in seconds would you say
18 passed between the contact with the Subaru and the Blazer and
19 the contact with the Honda and the Blazer?

20 A. Three to four. Three seconds.

21 Q. And then how long from when they come into contact
22 before you get out of the vehicle?

23 A. Probably a couple more, three seconds, because they
24 came into contact and he was shoving them backwards and then
25 that's when I jumped out.

1 Q. So up to maybe six seconds?
 2 A. From when he hit us?
 3 Q. From when he came in contact with the Subaru to when
 4 you got out of the car?
 5 A. Yeah.
 6 Q. And at that time you decided to take that gun with
 7 you?
 8 A. Yeah, yes.
 9 Q. And you were pretty upset at that point, right?
 10 A. Yes.
 11 Q. Did you know that you were going to use that gun
 12 when you got out of your car?
 13 A. Yes, because as far as I thought he was killing my
 14 kids. My kids, if they weren't, they were really hurt bad.
 15 Q. So a lot of that thinking is based on the assumption
 16 that the wheels of the Blazer are on the hood of the Honda?
 17 A. Yes, he was on top of my girls' car pushing it
 18 backwards.
 19 Q. If the wheels of the Blazer were not on the hood of
 20 the Honda, would that have changed your thinking about using
 21 the gun?
 22 A. With him still attacking my girls like that, is that
 23 what you're saying?
 24 Q. I'm saying you just testified that you got out of
 25 your car with the gun, and that the wheels of the Blazer are

1 we do have safeguards and the weapon has been properly
 2 secured. Matter of fact, why don't we have our bailiff assist
 3 us. Mr. Flock, that's fine, go ahead, if they need
 4 assistance. Pass that around, and if they need assistance you
 5 will be there. We will wait until they finish that, sir.
 6 Mr. Schwartz, I don't think I'm going to allow them
 7 to remove it out of the secured confinement, so you will have
 8 to make the demonstration in another fashion.
 9 MR. SCHWARTZ: Okay.
 10 Q. (By Mr. Schwartz) Well, what I'm trying to get at
 11 is comparing the gun to your hand. So if you would hold up
 12 the hand you were holding the gun in next to the gun.
 13 MR. VERHAREN: Objection, relevance.
 14 MR. SCHWARTZ: How he was bandishing this firearm.
 15 THE COURT: I'll allow him to do that, go ahead.
 16 Q. (By Mr. Schwartz) If you could just hold up the gun
 17 facing the jury and hold up your hand next to it?
 18 A. (Demonstrating).
 19 Q. Is that the hand the gun was in?
 20 A. Yes.
 21 Q. Once you got out of the vehicle with that gun, did
 22 you have it pointed at the Blazer the whole time?
 23 A. No, never.
 24 Q. Where was it pointed out at while you were running?
 25 A. At the ground.

1 on the hood of your children's Honda, right?
 2 A. Yes.
 3 Q. And at that point you knew that you were going to
 4 use the gun, right?
 5 A. Yes.
 6 Q. If the wheels of the Blazer were not on the hood of
 7 the Honda, would you still have been so sure about using the
 8 gun?
 9 A. Probably not, because it wouldn't have looked that
 10 graphic. My kids were definitely hurt, he was trying to kill
 11 my kids from what I was seeing.
 12 Q. I know this is going to be a little difficult
 13 because it's in a box. But if I could ask the witness to
 14 stand up. If you could hold the gun the way you were holding
 15 it, I know you had a sling on one arm?
 16 A. I was holding it in this hand, sir.
 17 Q. If you could hold up the box for us.
 18 MR. VERHAREN: Judge, I'm gong to object, I don't know
 19 see what that's going to accomplish.
 20 MR. SCHWARTZ: Your Honor, we have the right to publish
 21 the exhibit that's been entered to the jury.
 22 THE COURT: If you would like to publish the exhibit, you
 23 can certainly have the jurors examine the exhibit.
 24 MR. SCHWARTZ: Let's do that first then, Judge.
 25 THE COURT: That's fine. I would remind the jurors that

1 Q. So you have your right arm in a sling, and you have
 2 that gun pointed at the ground in your left arm?
 3 A. No, my right. My left was in a sling. You lid left
 4 left.
 5 Q. Sorry. So your right arm has the gun, your left arm
 6 is in the sling?
 7 A. Yes.
 8 Q. And you run across the road, correct?
 9 A. (Nodded affirmatively).
 10 Q. How long would you say it took you to run from your
 11 vehicle with the gun to the passenger side of the Blazer?
 12 A. I never made it to the passenger side, for one
 13 thing. That was when I ran back that was when he put it in
 14 reverse and came back.
 15 Q. How long when you left the Subaru until you got
 16 close enough to the vehicle and it started going in reverse?
 17 A. Three seconds.
 18 Q. So on top of the six seconds we have already
 19 established, we are up to nine seconds now?
 20 A. I'm guessing.
 21 Q. I know it's an estimation. Does that sound like a
 22 fair estimation?
 23 A. It seemed like it took forever. I'm just totally
 24 guessing here.
 25 Q. You testified that you couldn't quite see through

1 the back windows because they were tinted or dirty?

2 A. You couldn't.

3 Q. So you moved forward on the vehicle as it's starting
4 to go backwards, is that what happened?

5 A. He came off the vehicle when we made contact, and
6 then I started around the side. Could you ask the question
7 again, please?

8 Q. As the vehicle was backing up, that, right before it
9 started backing up was when you see it through the back
10 windows because they were tinted or dirty?

11 A. Yes.

12 Q. And then as the vehicle is backing up, you're also
13 moving forward, correct?

14 A. Then you're talking half seconds. He floors it
15 coming back, we made contact and stops. I'm going down the
16 side, and then coming up to the passenger window.

17 Q. So that all happens real quick?

18 A. Yeah.

19 Q. But you testified earlier that while that was
20 happening you eventually did get a view of the inside of the
21 vehicle, correct?

22 A. As I come up to the side, the first thing I see is
23 the dash going down, like I said. As I'm coming up, I can,
24 of course, see the dash over here, I'm seeing the dash here.
25 And then I see him grab the gearshift and slap it down and

1 puts her around in front. She was ahead of me when I had to

2 stop. When I was coming up, like I said, I was going to the
3 other side. That stopped me, slowed me down. She was running
4 to get around, all the way around to the girls is what she had
5 to be doing.

6 Q. Now, at the point you see him put it in drive, did
7 you also see a dog in the car?

8 A. Yeah.

9 Q. Where was the dog sitting?

10 A. Right next to him.

11 Q. In the passenger seat?

12 A. No, it was right up next to him. It was flopping
13 around in the cab, but it was like between the seats.

14 Q. Why didn't you mention that earlier?

15 A. Why? Nobody asked.

16 Q. You were describing what, Mr. Verharen asked you
17 what you saw?

18 A. I was talking about him.

19 Q. So at that point how far away from the vehicle are
20 you standing with that gun?

21 A. Just right outside the window.

22 Q. Less than a foot?

23 A. Yeah.

24 Q. So how far away would that put the barrel of that
25 gun from Mr. Ellington?

1 punch it.

2 Q. So he's backing up and you see him throw it into
3 drive and punch it?

4 A. As I'm coming up alongside, yes.

5 Q. And this is getting a little ahead of myself, but at
6 that point when he punches it, does he ever let up until the
7 end of this?

8 A. No.

9 Q. So at the time you see him switch it into drive,
10 where is your wife?

11 A. She's going, she's like over here. I'm looking,
12 start coming up like this, I can see her going around the
13 side.

14 Q. But she's not in front of the vehicle yet?

15 A. He is getting -- she's getting around, like I said.
16 When I came up like this, I'm turning like this, and seemed
17 like I see, I just remember seeing her. I can't say I seen
18 here 100 percent of the time. That slowed me down, so she's
19 well ahead of me.

20 Q. I'll ask my question again. You see him put it in
21 drive and slam on the gas?

22 A. She's going around, around the girls in front.

23 Q. But she's not in front of the vehicle yet when he
24 slams on the gas?

25 A. Yes, yes, she was. She was going around. So that

1 A. No, I'm sorry, I was thinking myself. The barrel of
2 the gun was less than a foot from the window.

3 Q. So how far would that put the barrel of the gun from
4 Mr. Ellington's head?

5 A. Four feet?

6 Q. So you have that gun about four feet away from
7 Mr. Ellington's head?

8 A. I had it four feet away from -- are you asking where
9 I was aiming or what?

10 Q. No, the distance from the gun to Mr. Ellington?

11 A. Four feet.

12 Q. At that point your wife was alive?

13 A. Yes.

14 Q. And at that point the vehicle is no longer in
15 contact with the Honda?

16 A. From what I can see, no.

17 Q. But you're pointing the gun at him?

18 A. Yes.

19 Q. Then you decide to shoot at Mr. Ellington or at
20 his car?

21 MR. VERHAREN: Objection, compound question.

22 THE COURT: Sustained.

23 Q. (By Mr. Schwartz) So you decide that you're going
24 to discharge your .44 caliber handgun?

25 A. After he was already going towards my wife.

1 Q. I think you testified that you decided to split the
2 difference between where the Honda was and where your wife
3 was, so that's why you shot at the engine block?
4 A. Yes.
5 Q. So did you ever yell at your wife get out of the
6 way?
7 A. No.
8 Q. Why not?
9 A. I'm sure she was trying, I didn't have to.
10 Q. Why didn't you say something to her?
11 A. I didn't, I didn't think I had to. That's sort of a
12 common sense.
13 Q. The vehicle starts forward. And at that point it's
14 still in contact with the Honda, it's scraping along the side
15 of the Honda, correct?
16 A. Because he's turning left in towards the wife the
17 way she was going, yes.
18 Q. But it's scraping along the Honda as it goes
19 forward?
20 A. I testified that I could hear something. I can't
21 see that side of the Blazer. I testified either it was the
22 tires or something was making noise, tires or scraping down
23 the side of the car.
24 Q. And so then you shoot at Mr. Ellington's car?
25 A. Yes.

1 had shot at it five times, you said that you went to your
2 wife, correct?
3 A. I went back, yes.
4 Q. And did either you or your daughters touch her?
5 A. No, that's what I said, we couldn't.
6 Q. And then you get in your car and start to move?
7 A. No.
8 Q. When did that happen?
9 A. After the officer arrived.
10 Q. And it's your testimony that you only think you
11 moved about a foot?
12 A. I know I didn't move more than a foot, yes, less
13 than, if I moved it at all.
14 Q. Were the police telling you not to move it?
15 A. Afterwards, yes. They opened the door, yes. They
16 opened the door and said turn it off and get off.
17 Q. As you were getting in the car and starting it, none
18 of the police officers told you not to move it?
19 A. I don't remember hearing anybody say anything, no.
20 Q. After that you were taken to the Rathdrum Police
21 department, correct?
22 A. After about 45 minutes or more, yes.
23 Q. And there you had a conversation with a Detective
24 Stewart, does that sound right?
25 A. Yes.

1 Q. How loud was it?
2 A. I don't --
3 Q. You have some experience with that gun, right?
4 A. Yes.
5 Q. It's pretty loud when it goes off?
6 A. By itself?
7 Q. Yeah.
8 A. By itself.
9 Q. Did you hear the gun go off?
10 A. I don't even remember it going off. I mean I, of
11 course, heard it, yes, I did hear it.
12 Q. Did you hear the bullet hit the vehicle?
13 A. No.
14 Q. Did you see what kind of entry it made into the
15 vehicle?
16 A. Yes.
17 Q. What did that look like?
18 A. Like a hole it would make.
19 Q. How big was that hole, would you say?
20 A. About dime size. Dime to nickel size.
21 Q. And then the vehicle proceeds forward?
22 A. It never stopped.
23 Q. When do you start shooting at it again?
24 A. After it ran over Vonette.
25 Q. After the Blazer had driven down the street and you

1 Q. I'm just going to go over some of the things you
2 said to Detective Stewart.
3 THE COURT: Mr. Schwartz, this might be a good place
4 to quit. I didn't know if we were going to get through
5 Mr. Larsen's testimony here this afternoon or not, that's why
6 I was running a little later than normal. It doesn't look
7 like we are going to finish up, don't want to rush you. We
8 will have to come back tomorrow, Mr. Larsen. We are going to
9 start up tomorrow morning at 8:30. We will be in this same
10 courtroom. See you back here at 8:30. You can step down for
11 today.
12 JOEL LARSEN: Okay, thank you.
13 THE COURT: Members of the jury, we will be in recess.
14 Again I would admonish you not to discuss this case among
15 yourselves, nor with others, nor shall you form or express any
16 opinion about it until it is finally submitted to you.
17 Again I'd remind you not to read or discuss any
18 newspaper accounts or any television accounts that may be
19 presented in this matter. Otherwise we will see you folks
20 back here tomorrow morning at 8:30 and we will get under way
21 at that time. As we will see counsel here at that time. We
22 will stand adjourned.
23 (Concludes proceedings on August 28, 2006)
24
25